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**PRINCIPLES OF THE
ENGLISH LAW OF CONTRACT**

PRINCIPLES
OF THE
ENGLISH LAW OF CONTRACT
AND OF
AGENCY IN ITS RELATION TO CONTRACT

BY
THE RIGHT HONOURABLE
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OXFORD UNIVERSITY PRESS
AMEN HOUSE, E.C. 4

London Edinburgh Glasgow New York
Toronto Melbourne Capetown Bombay
Calcutta Madras

HUMPHREY MILFORD
PUBLISHER TO THE UNIVERSITY

PREFACE

TO THE NINETEENTH EDITION

SIR JOHN MILES, with whom I collaborated in preparing the last two editions of this book, has to my great regret been unable to join in this edition, and I am therefore solely responsible for it. The difficulties of publishing during the war have made the interval between this edition and the last unduly long, and the lapse of time has made the task of revision a heavy one. I hope, however, that I have not overlooked any important development that has taken place in the law of Contract. Besides making the numerous changes which were necessary to bring the book up to date, I have found it desirable to rewrite or to rearrange considerable parts of the book. Most of Chapter I, including the historical section, is new; so is much of Chapter VII on Undue Influence, of Chapter XV on Impossibility, the section on *Quantum meruit* in Chapter XVII, and the whole of Chapter XXI on Quasi-Contract. In making these alterations and throughout the preparation of this edition I have kept in view the original aims and scope of the book as Sir William Anson set them out in the passage from the Preface to the sixth edition which is reprinted below.

My chief debt in preparing this edition is due to Sir Arnold McNair, Vice-Chancellor of Liverpool University. He has read all the proofs, and suggested numerous changes both of substance and of detail which have much improved the book. I also wish to acknowledge my indebtedness to Professor P. H. Winfield, who kindly read the proofs of my chapter on Quasi-Contract, to Professor A. L. Goodhart, who advised me on the revision of the section on Mistake as to the identity of the person in Chapter V, and to Mr. R. H. New, of the Oxford University Press, who has prepared the indexes. I have also received many

useful suggestions from some of the reviews of the last edition, and from individual correspondents who have been good enough to write to me about the book.

J. L. B.

OXFORD,
June 1945

The following passages from Sir William Anson's Preface to the Sixth Edition show the origin of this book and the scope which he intended it to have.

'WHEN the subject of Contract was first introduced into the School of Jurisprudence at Oxford, in the year 1877, teachers of Law had to consider the books which their pupils might best be directed to read. Some works on the subject, of acknowledged value to the practising lawyer, were hardly suitable for beginners, and the choice seemed to lie between the works of Mr. Leake, Sir Frederick Pollock, and the late Mr. Smith. Of these, Mr. Smith alone wrote expressly for students, and I had, as a student, read his book with interest and advantage. But I thought that it left room for an elementary treatise worked out upon different lines.

'Neither Sir Frederick Pollock nor Mr. Leake wrote for beginners, and I feared lest the mass of statement and illustration which their books contain, ordered and luminous though it be, might tend to oppress and dishearten the student entering upon a course of reading for the School of Law. Being at that time the only public teacher of English Law in the University, I had some practical acquaintance with the sort of difficulties which beset the learner, and I endeavoured to supply the want which I have described. . . . To both these writers I must own myself to be under great obligations. . . .

'The object which I set before me was to trace the principles which govern the contractual obligation from its

beginning to its end; to show how a contract is made, what is needed to make it binding, whom it may affect, how it is interpreted, and how it may be discharged. I wished to do this in outline, and in such a way as might best induce the student to refer to cases, and to acquire the habit of going to original authorities instead of taking rules upon trust. So I have cited few cases: not desiring to present to the reader all the modes in which principles have been applied to facts, and perhaps imperceptibly qualified in their application, but rather to illustrate general rules by the most recent or most striking decisions. . . .

‘I strongly desire to keep it within such limits as is proper to a statement of elementary principles, with illustrations enough to explain the rules laid down, and, as I hope, to induce the student to consult authorities for himself.

W. R. A.

ALL SOULS COLLEGE,

January 1891

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M. & S. . . .	Maule and Selwyn . . .	K. B. 1813-1817
M. & W. . . .	Meeson and Welsby . . .	Ex. 1836-1847
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Ves. . . .	Vesey junior . . .	Chancery, 1789-1816
Ves. Sen. . . .	Vesey senior . . .	Chancery, 1746-1755
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Yelv. . . .	Yelverton . . .	K. B. 1601-1613
W. Bl. . . .	William Blackstone . . .	K. B. 1746-1779

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PART I

FORMATION OF CONTRACT

CHAPTER I

The Nature and Elements of a Valid Contract

§ 1. *Nature of Contract in English Law*

THE principles of the English law of Contract are almost entirely the creation of the English courts, and the legislature has had little part in their development. They are also, for the most part, a development of the last two hundred years; for Contract law is the child of Commerce, and has grown with the growth of England from a mainly agricultural into a mainly commercial and industrial nation. In Blackstone's Commentaries, which were first published in 1756, it is significant of the comparative unimportance of the subject that he devoted 380 pages to the law of real property and only 28 to the law of Contract, and that he treated contract as one among other methods of acquiring a title to property in things personal, distinguishing it from *gift* or *grant*, with which he regarded it as 'much connected', by the fact that contract as a rule vested a property 'not in possession, but in action merely, and recoverable by suit at law'. Thus to Blackstone the law of Contract was rather a subdivision of the law of property than an independent branch of law.

In fact it differs from other branches of law in an important respect. It does not lay down a number of rights and duties which the law will protect or enforce; it consists rather of a number of limiting principles, subject to which the parties may create rights and duties for themselves which the law will uphold. The parties to a contract, in a sense, make the law for themselves; so long as they

do not infringe some legal prohibition they can make what rules they like in respect of the subject-matter of their agreement, and the law will give effect to their decisions.

Modern
limita-
tions on
freedom of
contract

Ch. IX

This book is concerned with the *principles* of our law of Contract, and only incidentally and occasionally with the limitations that the law places on the application of those principles in particular cases. But unless the reader keeps this limited scope of the book in mind, he may form a misleading picture of the role that Contract plays in the modern law. When Sir Henry Maine wrote his *Ancient Law* in 1861, it was approximately, though not even then wholly, true to say, as he did, that 'imperative law had abandoned the largest part of the field which it once occupied, and had left men to settle rules of conduct for themselves with a liberty never allowed to them until recently', and that 'the law even of the least advanced communities tends more and more to become a mere surface-stratum having under it an ever-changing assemblage of contractual rules with which it rarely interferes except to compel compliance with a few fundamental principles, or unless it be called in to punish the violation of good faith'. But Maine was writing at the close of an epoch in which the champions of an individualist social philosophy had been attacking legal and social restrictions behind which privileges were entrenched which were often indefensible; the battle had been won, and freedom of contract was one of the trophies of victory. To-day the position is very different. Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and in the far more complicated industrial conditions of to-day it is obvious that that equality often does not exist in any real sense. Hence there has been a fundamental change both in our social outlook and in the policy of the legislature towards contract, and the law to-day interferes at numerous points with the freedom of parties to make

whatever contracts they like. These interferences are especially common in the relation between employers and employed; there are Truck Acts requiring wages to be paid in money, Workmen's Compensation Acts making an employer in effect the insurer of his workmen against accidental injuries, Wages Councils and other Acts fixing a minimum wage that he must pay them, and scores of other legislative provisions which will override any contrary terms that the parties may make for themselves. It would be easy to cite other relations the incidents of which have to a greater or less extent been taken out of the sphere of free contract and subjected by legislation to rules of law—the Moneylenders Acts, the Rent Restriction Acts, the Hire-Purchase Act, are well-known examples—but the tendency is so common that it is unnecessary to multiply examples; any volume of the modern statute book will provide them. It is important that the student should not be unaware of this social background and these limiting tendencies within which the principles with which this book is concerned have to operate to-day.

At the outset of an inquiry into the principles of the law it may be well to state the nature of the inquiry, its main purposes, and the order in which they arise for discussion.

Outline
of the
subject

First, therefore, we must ask what we mean by Contract.

Nature of
Contract

Next we must ask how a contract is made; what things are needful to the Formation of a valid contract.

Its forma-
tion

When a contract is made we ask whom it affects, or can be made to affect. This is the Operation of contract.

Its opera-
tion

Then we inquire how the Courts regard a contract in respect of the evidence which proves its existence, or the construction placed on its terms. This we may call the Interpretation of contract.

Its inter-
pretation

Last we come to the various modes by which the contractual tie is unfastened and the parties relieved

Its dis-
charge

from contractual liability. This is the Discharge of contract.

And first as to the nature of Contract.

We may provisionally define the law of Contract as that branch of our law which determines the circumstances in which a promise shall be legally binding on the person making it. We have therefore to analyse this conception, and to ascertain the machinery by which men are constrained to keep faith with one another.

A Promise may be defined as a declaration or assurance made to another person with respect to the future, stating that the maker will do, or refrain from, some specified act, and conferring on that other a right to claim the fulfilment of such declaration or assurance. It involves therefore two parties at least, one making and the other receiving the declaration with respect to the future, whom we call respectively the promisor and the promisee. It is more than a mere statement of intention, for it imports a willingness on the part of the promisor to be *bound* to the party to whom it is made. It is more again than a mere offer, for it is an offer which the other party has accepted. A Promise in fact connotes an *Agreement* between the parties to it.

What then must be added to this definition before a Promise will become *legally* binding on the person making it; or in other words on what conditions will English law recognize the Agreement of the parties which contains a Promise as a Contract?

The answer to this question will form the subject of many of the following chapters of this book, but it may be expressed, in the most general terms, as follows:

1. The intention of the parties must be to create an obligation between them—that is to say, to impose a duty on the promisor to fulfil his promise, and to confer a right on the promisee to claim its fulfilment—which is not merely a moral, but a *legal* obligation.

2. The promisor must either make his promise in a certain solemn form, namely, under seal; or he must receive something from the promisee in return for his promise, which is technically called the 'consideration', and may take the form either of another promise, or of an act or forbearance to act.

3. The promise must not infringe any rule of law.

§ 2. *Historical Introduction*

Our modern law of Contract contains much which can be properly understood only in the light of its history; and indeed without some acquaintance with this the Law Reports, and especially those earlier in date than certain simplifications of procedure which were made in the nineteenth century and of which more will have to be said hereafter, will hardly be intelligible to the student. Hence even in a book which aims only at stating the principles of the modern law it is desirable to give some account of how that law came to take the form which has just been indicated in outline. We shall see that the law was not moulded by any process of analysing and elucidating the essential nature of a contract; indeed, the very idea of enforcing promises or agreements as such, which seems so natural to us, is not an early one in the history of any legal system. We have to go back therefore to a time before any such purpose was consciously present to the minds of English lawyers, and we shall find that the key to the story lies in the conditions which the Courts have attached at different stages in it to the actions which they were willing to admit for enforcing the kind of rights which we have now come to regard as contractual. The story can here be given only in barest outline, and the student should understand that there are some points in it which are still obscure or controversial. For an adequate discussion of these he must be referred to the books which deal with the history of our law, and especially to Sir

William Holdsworth's great History of English Law, volumes iii, pp. 416-54, and viii, pp. 1-48.¹

We may start from the fact that by the end of the thirteenth century two forms of action for enforcing rights, which included some of those that we should now call contractual, had taken fairly definite shape. These are the action of Debt and the action of Covenant.

tion of
.bt

It is difficult to describe the action of Debt without reading back into medieval times legal ideas which would not have occurred to the lawyers of those days. But if we are to fit it into our modern categories we shall have to say that at first it had more the character of a recuperatory, than of a contractual, remedy. In fact, originally Debt was closely akin to, and indeed hardly distinguishable from, another action, the action of Detinue, in which the plaintiff alleged that the defendant was 'unjustly detaining' from him some chattel to which he, the plaintiff, was entitled. So in Debt the gist of the action was that the defendant was detaining a sum of money which was really the plaintiff's property; the defendant might owe him this debt as the result of some contract between them, perhaps a sale of goods, or there might have been no contract and the sum might have become owing in some other way—for example, by the judgment of a court; in either case the plaintiff's claim was not so much a claim against the defendant personally but a claim for something which was already the plaintiff's property, which he was seeking to recover from the defendant, but which the defendant was wrongfully withholding from him.

This then being the character of the action of Debt, it is clear that it did not go very far towards providing a remedy on a contract. For a contract would result in a 'debt' being owed to the plaintiff only after he had performed his own part under it; for instance, if the plaintiff

¹ Reference may also be usefully made to Plucknett, Concise History of the Common Law, Part IV, and to Potter, Historical Introduction to English Law, Part III, ch. 5.

had agreed to sell goods, he must have delivered them. Or to put the same point from the side of the defendant, he would only be liable in an action of Debt if he had received from the plaintiff a *quid pro quo* for his promise to pay the money, because otherwise he would owe no 'debt'; he could not be sued merely because he had *promised* to pay the money, for a mere promise did not constitute a sufficient *quid pro quo* upon which to found the action. It is possible that the Courts might in time have modified the conditions of this action and developed out of it a remedy for the enforcement of a mere promise, but we shall see that they invented another and more convenient remedy to meet that case.

One reason why Debt did not develop in this way was probably because there were certain inconvenient incidents attaching to it which made it unpopular. One of these was that in Debt the defendant might 'wage his law', and the action would then be determined, not upon the merits, but by the process known as 'compurgation', in which the defendant came into Court and declared upon oath that he did not owe the debt, and eleven respectable neighbours, his 'compurgators' or 'oath-helpers', declared, also upon oath, that they believed him to speak the truth.¹

When an agreement had been made under seal, however, the appropriate action was not Debt, but Covenant. Here the agreement was enforced because it had been made in a particular form to which the law attached a peculiar force, and if this form had been used, any kind of agreement would be enforceable. But it seems that for some time, if an agreement had resulted in a definite,

Action of
Covenant

¹ The number is not quite certain, and it may have varied. Wager of law was no doubt liable to abuse, but at a time when there were no rules of evidence, when juries were not hearing witnesses and finding the facts from what they heard, and when an oath was regarded with superstitious reverence, there was nothing ridiculous about it. When it fell into disuse even as late as the seventeenth century, it left an awkward gap in our legal procedure. (See on this point Plucknett, loc. cit., p. 578.)

or as we should say a 'liquidated', sum becoming due, then, even though this debt might be evidenced by a seal, Debt and not Covenant was the proper action. Eventually, however, though probably not until the end of the sixteenth century, Covenant and Debt became alternative remedies in such a case.

The remedy which was eventually found for the enforcement of *informal* promises is a curious instance of the shifts and turns by which practical convenience evades technical rules. Such a remedy was developed out of two actions, the action of Trespass and the action of Deceit; and at first sight it requires some ingenuity to see any logical connexion between promises and these actions. But briefly the process was as follows.

Action on
the Case

Trespass lay for a direct physical injury to person or property, but by some process, the details of which are exceedingly obscure, there had been developed out of it a modified form of action which would lie for injuries which were not direct or physical, and this modified form of action came to be known as Trespass on the Case, or simply as Case. Case is the parent of many of our modern torts, such, for instance, as nuisance or negligence, but with that side of its prolific development we are not here concerned. Deceit, too, was at first a very narrow and technical form of action, but out of it also there seems to have developed an action of Deceit on the Case which had a wider compass. The boundaries between these two actions on the Case are difficult to trace, and we need not attempt to do so, for in the future development of Case in relation to the enforcement of promises, which is what we are concerned with, not much seems to turn upon the distinction between them.

Now if we are to apply our modern categories to Case, it is evident that it was an action of tort, and this as we shall see is important, for the modern law of Contract still retains elements which remind us of this origin. Case then lay originally for damage caused by one man to

another by the commission of an unlawful act, a *malfeasance*, but one not amounting to an actual *trespass*. Then in the course of the fourteenth century it came to be allowed as a remedy when damage had been caused by the doing of a lawful act in an unlawful way, by a *misfeasance*, and here we get its first connexion with promises. For obviously one common occasion of one man injuring another by a *misfeasance* is where he has promised to do something for that other and has fulfilled his promise so negligently or otherwise improperly that the other has been damnified by his conduct. At this stage in the story we begin to see a special form of Case breaking off from the parent stock, applicable to the case where damage has been caused by the misperformance of what a man has promised or 'assumed' to do. This is the action of *Assumpsit*, and it was destined to have a long history of its own, and by its development to mould the conditions on which mere informal promises were to become actionable in our law. But note that at this stage the gist of the action is still a tort; the promise which the defendant has broken has provided the *occasion* for the wrongful act by which he has injured the plaintiff, but it is for the consequences of that act, and not for the broken promise as such, that the action is allowed.

The first reported attempt to adapt *Assumpsit* to executory contracts, that is to say, to use it for the enforcement of a promise as such, was in the reign of Henry IV, when a carpenter was sued because he had undertaken (*quare assumpsisset*) to build a house within a certain time and had not done so. It will be seen that here there was a mere *nonfeasance*, and not a *misfeasance*, and the judges held that the action, if any, would have to be in Covenant, and as the promise was not under seal, the action failed; 'if the work had been begun,' said one of them, 'and then by negligence not finished, it would have been otherwise.' But by this time the obvious inconvenience of there being no remedy for the breach of

Holdsworth,
1 c., vol. iii,
p. 433

an executory contract, unless it had been made under seal, was beginning to influence the Courts, and there was besides a special reason why the Common Law Courts could not rest content with the law as this case had left it. This was their fear that the Chancellor, who was showing signs of being willing to enlarge the jurisdiction which he already exercised over contracts, might annex a subject which they regarded as their own, and so we find that at about the end of the fifteenth century they had begun to allow Assumpsit to lie for the *nonfeasance* of a mere promise. Probably we can see in this development traces of that form of Case which had been derived from the action of Deceit, for the non-fulfilment of a promise may fairly be regarded as a kind of deceit. At first it seems that Assumpsit was only allowed in these cases of *nonfeasance* if the plaintiff had paid money under the agreement, but before long it was enough if he had suffered some kind of detriment under it other than the payment of money. Note here again how the tortious origin of Assumpsit clings to it as its development proceeds; the gist is still the detriment or loss that the plaintiff has suffered in respect of the defendant's undertaking. Note also the difference of principle in this respect between Assumpsit and Debt, for in Debt, as we have seen, the underlying idea is that the defendant ought to be compelled to pay the debt, not because the plaintiff has been damnified, but because he, the defendant, is wrongfully detaining moneys which already belong to the plaintiff.

Indebita-
tus
Assumpsit

But even after this advance the law was still far from the enforcement of a purely executory contract; it was still requiring that a party should have performed his side of a bargain before he could have an action either in Debt or Assumpsit. The next stage in this curious story came about the middle of the sixteenth century, when the Courts began to allow Assumpsit to be brought in cases where Debt (which, as we have seen, was an inconvenient and therefore an unpopular, form of action) was the appro-

priate action.¹ Suppose one man who is indebted to another has promised that he will pay the debt; why, it began to be asked, should not the action be brought, not on the debt itself, i.e. in Debt, but on this promise to pay it, i.e. in Assumpsit? The Courts began to say that it might be, and when Assumpsit was used in this way as an alternative to Debt, it came to be known as 'Indebitatus Assumpsit' (that is to say, 'the defendant, *being indebted* has *promised* to pay the debt'), and this offshoot of Assumpsit was destined, as we shall see, to have an important history of its own. The significance of the step for the general development of the law of Contract has been pointed out by Sir William Holdsworth. It was that the Courts had now at last definitely begun to allow an action to be brought on an informal promise. True, it had to be a promise to pay an existing debt, and it must have been made expressly, and subsequently to the time at which the debt was incurred; but still it was to the promise that attention was now for the first time beginning to be directed. 'The mutual undertakings of the parties, rather than the performance by one of them, will tend to be regarded as the fact which imposes the liability. Performance on one side will no longer be requisite; and thus wholly executory contracts will become actionable.'

1 c. , vol. iii,
p. 442

The culminating step in this part of the story was taken in 1603 in *Slade's Case*, which, so Coke tells us, was twice argued before all the justices of England and the barons of the Exchequer. It was resolved in this famous case 'that although an action of Debt lies upon the contract [that is

4 Co. Rep.
92 b

¹ One of the causes which facilitated this extension is amusing. It began in the King's Bench, and for almost a generation it was resisted by the Court of Common Pleas, which often contrived to have the King's Bench decisions reversed in the Exchequer Chamber, the body to which they went on appeal. The difference arose from the jealousy towards one another of these two Courts of Common Law, for whereas actions of Debt could be brought only in the Common Pleas, Assumpsit could be brought in either Court. So the King's Bench, by extending the scope of Assumpsit, had set itself to filch the jurisdiction of the Common Pleas, and the latter resented the encroachment. (See Plucknett, *loc. cit.*, p. 576.)

to say, on the original contract from which the debt has resulted], yet the bargainer may have an action on the Case [that is to say, an action of Assumpsit on the *promise* to pay this debt, which hitherto, it will be remembered, had had to be both express, and subsequent to the creation of the debt], or an action of Debt, at his election'; and further, 'that every contract executory imports in itself an assumpsit [that is to say, the original bargain *implies* a promise, so that henceforth the promise need not be made either expressly or subsequently], for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day,¹ in that case both parties may have an action of Debt,² or an action of Assumpsit, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the Case, as well as actions of Debt.'

One further consequence which was soon seen to follow from the decision of *Slade's Case* must be noted here. Since it was no longer necessary, when a debt had come into existence, that there should have been an express and subsequent promise to pay it, it was now enough that a promise should have been made at the time of the bargain, for, as the court said, 'every contract executory imports in itself an assumpsit'. But when that had been settled, there was no longer any good reason for insisting that the promise to pay must have been expressed in words; it might equally well be implied by the conduct of the parties

¹ These were the facts in *Slade's Case* itself; the jury had found an agreement to sell, but that there had been no subsequent assumpsit.

² The reason why an action of Debt was possible on these facts although, the contract being still executory, no actual debt had arisen, was that a contract for the sale of goods had by this date become an exception to the usual rule, and a *promise* to deliver the goods had come to be regarded as a sufficient *quid pro quo* for the *promise* to pay for them, and therefore Debt would lie. (See Holdsworth, loc. cit., vol. iii, pp. 355-6.)

when they made their bargain. Hence not long after *Slade's Case* we find the Courts allowing Assumpsit to be brought when services had been rendered or goods supplied in circumstances which made it clear that they were to be paid for, even though the amount of the payment had not been expressly fixed. The plaintiff was allowed an action for *quantum meruit*, for the amount which his services deserved, or for *quantum valebant*, the amount which the goods were worth, or, as we should say to-day, he was allowed to claim a *reasonable* remuneration, or a *reasonable* price. We shall see later that the Courts eventually went even farther than this, and were ready to imply a contract not only from the conduct of the parties, but from facts which showed no genuine contract at all, but this is a development to which it will be necessary to return when we come to the subject of quasi-contracts. For the present we may leave the history of Assumpsit at the point to which we have carried it.

Infra, ch.
XXI.

It was only in 1852 that it ceased to be necessary to mention in the writ by which an action was begun the particular form in which it was being brought, for until then an action might fail, if the pleader chose the wrong form, even though there might have been a good *cause* of action in another form. But by the Common Law Procedure Act of that year the writ was in future to be a simple *writ of summons* mentioning no special form of action. For a few years longer the old forms still remained distinct from one another, and in the later stages of an action it was still necessary to choose the appropriate one. At last, however, the Judicature Act of 1873 abolished the forms of action altogether, and to-day success in an action depends only on being able to establish facts which show a good *cause* of action, and not also on describing this cause of action in the appropriate technical language. But since, as this story shows, our modern *causes* of action have been moulded by the old *forms*, even to-day they cannot be neglected. This is what a great

Common
Law Pro-
cedure Act
1852

Judicature
Act, 1873,
abolishes
the forms
of action

historian of our law, F. W. Maitland, meant when he wrote that although we have buried the forms of action they still rule us from their graves.

Origin of
Consider-
ation

We still have to ask how Consideration became the test of the actionability of an informal promise, and that, question has been answered in different ways. But it seems likely that we tend to put it to ourselves to-day in a form in which it would not have occurred to the judges of the sixteenth and seventeenth centuries. We are tempted to picture these judges as having, so to speak, opened the door to the enforcement of informal promises, and then feeling that they must find some means of making sure that the door would not be opened too widely, and therefore more or less deliberately looking round for some limiting test. Some scholars have suggested that they borrowed such a test from the practice of the Chancellors, who had seemed likely at one time to develop a law of Contract of their own. If they had, it would probably have been based on the Roman Law idea of *causa*, or, it would be more correct to say, on the idea of *causa* as medieval lawyers had misunderstood it. Roman law was supposed to have required the presence of something beyond the mere consent of the parties in order to 'clothe' an agreement with actionability;¹ without such a *causa*, some special 'reason' why an agreement should be actionable, it would remain 'unclothed', a mere *nudum pactum*, and obviously the presence of 'consideration', the fact that the promisee was making some return for the promise, would be a reason of this kind. Others have thought that

¹ For a discussion of the difference between *causa* and consideration reference may be made to Buckland and McNair, *Roman Law and Common Law*, p. 171 et seq. The authors, contrasting English with Roman law, point out how much we owe to the Action of *Assumpsit*. It gave us, not indeed a general *theory* of contract, but a general *remedy* for the enforcement of contracts. In Roman law no agreement was a contract unless the law made it binding. In our law every agreement purporting to affect legal relations is a contract, unless, for some reason, such as illegality or absence of consideration, the law rejects it. In the result we have a law of contract, while the Romans developed only a law of particular contracts with independent origins and histories.

they found it in the *quid pro quo* of the action of Debt, and no doubt when Debt had been largely absorbed into Assumpsit it may well have been regarded as taking with it the conditions upon which it would lie. It is quite likely that the existence of precedents such as these may have made the acceptance of Consideration in Assumpsit easy and natural. Another influence may well have come from the local courts, about which we know little; for it must not be forgotten that the development of Assumpsit, of which we have been trying to trace the outlines, was the work of the King's Courts, and that, as Professor Winfield has pointed out, 'the records of the local courts give us a vivid picture of how the medieval man managed to get many of his agreements enforced, distant as the age may have been from any technical law of contract'.¹ For instance, in the contract of sale, with which the local courts must constantly have had to deal, there existed a formless contract of everyday occurrence long before the doctrine of Consideration took shape in the King's Courts, and if we generalize the conception of a 'price', which was a necessary and familiar element in any contract of sale, we arrive at a notion which is very close to that of Consideration. But it is unlikely that there was any conscious imitation or borrowing of any outside model, for Consideration was really implicit in the nature of the action of Assumpsit itself. It was a legacy of the tortious origin of that action, for the essence of Consideration is that the plaintiff must have suffered a detriment on the faith of the defendant's promise, and it developed *pari passu* with the development of the action itself. It was the term that was used, at first without any technical significance, but gradually more and more as a term of art, to denote the conditions upon which the Courts would allow an Assumpsit to lie. We have seen how these conditions were progressively defined, but throughout their evolution

¹ Some illustrations of this will be found in Professor Plucknett's *Concise History of the Common Law*, at p. 96.

they always involved that one who sought to enforce a promise made to him by another must be able to show that he had given or suffered something in return for it. This is still the essence of Consideration, but we shall see, when we come to treat of the present law, that many of the fundamental points in the doctrine were not settled until the late eighteenth, and even the nineteenth, century.

§ 3. *Elements of a Valid Contract*

We have now to ascertain how contracts are made.

We look in the first instance for:

Elements
necessary
to a valid
contract

1. A statement of the terms of an agreement of the parties affecting their legal relations, the evidence of which commonly takes the form of Offer and Acceptance.

2. The presence of either (*a*) Form, or (*b*) Consideration.

If (1) and (2) are satisfied we have a contract which, *prima facie*, will hold, or at any rate we have the outward appearance of a contract; and yet some necessary elements of validity may be wanting. Thus:

3. The parties must have capacity to make a valid contract.

4. Their consent must be genuine.

5. The agreement must not be one that the law declares to be either illegal, or void.

Results of
their
absence

Where all these elements co-exist, there is a valid contract: where one is absent the contract may be either *illegal*, *void*, *voidable*, or *unenforceable*.

Termino-
logy

The student should note carefully these terms, because they are of constant use in the law of Contract, because they are not infrequently used with insufficient precision, and because they signify very real differences in the rights arising out of contract.

An illegal contract is one which the law forbids to be made; a void contract is one to which it will not give effect. Strictly speaking, 'void contract' is a contradiction in terms; for the words describe a state of things in which, despite the intention of the parties, no contract has been

made. Yet the expression, though faulty, is a compendious way of putting a case in which there has been the outward semblance without the reality of contract.

A voidable contract is one which one of the parties may affirm or reject at his option.

An unenforceable contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot sue upon it.

When a contract is shown to be void it can create no legal rights. It is a nullity. But a voidable contract is a contract with a flaw of which one of the parties may, if he please, take advantage. If he choose to affirm the contract, or if he fail to use his right of avoidance within a reasonable time so that the position of the parties becomes altered, or if third parties acquire rights in goods passing under the contract, he may find himself bound by it.

Difference
between
void and
voidable

An illustration will show the essential difference between what is void and what is voidable.

(1) *A*, being led to think that *X* is *Y* and that he is selling to *Y*, sends goods to *X*: *X* sells the goods to *M*. The transaction between *A* and *X* is void, and *M* acquires no right to the goods.

Cuady v.
Lindsay,
3 App. Ca.
459

(2) *A* sells goods to *X*, being led by the fraud of *X* to think that the market is falling. Before *A* has discovered the fraud or has acted on the discovery, *X* resells the goods to *M*, who is innocent of the fraud and gives value for the goods. As the transaction between *A* and *X* is voidable and not void, *M* acquires a good title to the goods, and *A* is left to his remedy against *X* by the action for Deceit, an action *ex delicto*.

Babcock v.
Lawson,
4 Q. B. D. 394

In the first of these cases, when the mistake is proved, the nullity of the contract prevents any right arising under it at all. In the second there is a contract, and one capable of creating rights, and the person defrauded has a right to affirm or avoid, limited as above described.

The difference between what is voidable and what is unenforceable is mainly a difference between substance

Unen-
forceable

and procedure. A contract may be good, but incapable of proof owing to want of written form, or failure to affix a revenue stamp. Writing in the first case, a stamp in the last, may satisfy the requirements of law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract is unimpeachable, only it cannot be directly enforced in Court.

It may be useful to the student at this point, and before considering in detail the various elements of validity in Contract, to take note of some rules of procedure, and some terms which if not understood and kept in view may cause him difficulty and confusion of mind.

Remedies

A plaintiff in an action on a contract may ask for one, and sometimes more than one, of five remedies:

Damages, or compensation for the non-performance of the contract;

Specific performance, or an order that the contract shall be carried out by the defendant according to its terms;

Injunction, or the restraint of an actual or contemplated breach of contract;

Cancellation, or the setting aside of the contract;

Rectification, or the alteration of the terms of a written contract so as to express the true intention of the parties.¹

Juris- diction

The first of these is the remedy formerly obtainable in the Common Law Courts; the other remedies could only be obtained in the Court of Chancery as administering Equity. The Chancery Court did not give damages,² but directed that certain things should be done or forborne, whereby the rights of the parties were adjusted. The Judicature

Société
Maritime v
Venus Co.,
9 Com. Cas.
289

¹ A plaintiff may also ask for a Declaration from the Court as to the true terms of a contract or his rights under it. This can scarcely be described as a 'remedy', though the ascertainment of his rights with the assistance of the Court may enable him the more effectively to enforce his remedy thereafter, if the need should arise.

² The power of giving damages, conferred on the Chancery Courts by the Chancery Amendment Act, 1858, was rarely used.

Act, 1873, now enables the High Court of Justice, the Court of Appeal, and every Judge of those Courts, to give effect indifferently to all equitable, as well as to all legal, rights and remedies.

Nevertheless the remedy formerly given by the Common Law Courts only is not only different in kind from the remedies formerly given in the Court of Chancery, but is administered on different principles.

If *A* has made a valid contract with *B*, he is entitled *as of right* to damages from *B* if *B* breaks the contract—the measure of damages is a topic to be dealt with hereafter—but it does not follow that he can get a decree for the specific performance of the contract, or an injunction to restrain *B* from doing such acts as would amount to its violation.

Legal remedies

Equitable remedies are limited partly by their nature, partly by the principles under which they have always been administered in Chancery.

Equitable remedies

The remedy by specific performance is necessarily limited in application to cases in which a Court can enforce its directions. Engagements for personal service illustrate the class of cases in which it would be neither possible nor desirable for a Court to compel parties to a performance of their contract; and where the contract is such that a Court will not grant a decree for specific performance it will not, as a rule, grant an injunction restraining from breach.

The principles on which equitable remedies are given impose a further limit to their application. Their history shows that they were special interventions of the King's grace, where the Common Law Courts were unable to do complete justice. They are therefore supplemental and discretionary; they cannot be claimed *as of right*. The suitor must show that he cannot otherwise obtain a remedy appropriate to his case, and also that he is a worthy recipient of the favour which he seeks.

Limitations of the latter

Hence we find that where damages afford an adequate remedy, Courts of equity will not intervene, a rule which

is constantly exemplified in cases where specific performance is asked for; the suitor is told that damages will give him all the compensation which he needs. And again we find that the application of equitable remedies is affected by the maxim, 'he who seeks equity must do equity'. One who asks to have his contract rectified or cancelled, on the ground that he has been the victim of mistake, fraud, or sharp practice (which is not technically the same as fraud), must show that his dealings throughout the transaction have been straightforward in every respect.

CHAPTER II

The Promise

A CONTRACT consists in an actionable promise or promises. Every such promise involves two parties, a promisor and a promisee, and an expression of common intention and of expectation as to the act or forbearance promised. When a contract consists, as it often does, of mutual promises, each party is of course both a promisor and a promisee, and this fact should not be lost sight of by the student. It tends to be somewhat obscured in statements of the law of Contract because the legal interest of a contract usually begins only when some doubt or dispute has arisen as to the promise of one of the parties, and in discussing the question which has arisen he is naturally referred to as the promisor. But he may well be also a promisee.

On the threshold of our subject we must bring the parties together, and must ask, How is this expectation created which the law will not allow to be disappointed? Has a definite promise been made, and, if so, what are its terms? For 'unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law, and the document contains no machinery for ascertaining it.'

We may start therefore with the principle that the law requires the parties to make their own contract; it will not make a contract for them out of terms which are indefinite or illusory.

Thus it has been held that when a motor-van was to be bought on the understanding that part of the price should be paid on 'hire-purchase' terms, and when woollen goods were to be bought 'subject to war clause', there was no completed contract in either case, for 'hire-purchase

Foley v. Classique Coaches, Ltd., *per* Maughan, L. J. [1934] 2 K.B. at p. 13

Parties must make their own contract

Scammell v. Ouston [1941] A.C. 251 Bishop & Barber v. Anglo-Eastern Trading Co. [1943] 3 All E.R. 598

terms' and 'war clauses' may take many forms, and it is for the parties and not for the Court to define them. On the other hand, a transaction which at first sight seems to leave some essential term of the bargain undetermined may, by implication, if not expressly, provide some method of determination other than a future agreement between the parties. In that event, since it is a maxim of the law that *id certum est quod certum reddi potest*, there will be a good contract. In every case the function of the Court is to put a fair construction on what the parties have said and done, though the task is often a difficult one when an instrument has attempted to record some complicated business bargain. The parties making such a bargain naturally assume that it will be carried out and therefore do not always express it with the exactness of terminology that lawyers, whose profession leads them to contemplate the possibility of future disputes, might have employed.

Hillas & Co.
v. Arcos, 147
L.T. at
p. 514

Some of the considerations of which the Courts take account in such cases have been well expressed by Lord Wright in the following passage:

'The document cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract, and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to *make a contract* for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is fair and reasonable, to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be

adjusted in the working out of the contract. Save for the legal implications I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words may be difficult, that is not a reason for holding them too ambiguous or uncertain if the fair meaning of the parties can be extracted.'

When there is doubt whether an agreement has actually been reached, or if it has, what are its precise terms, it is often useful to inquire whether in the negotiations which have taken place between the parties we can find a definite Offer on one side, and an equally definite Acceptance of that Offer on the other. For most contracts are reducible by analysis to the Acceptance of an Offer. If, for instance, *A* and *X* have agreed that *A* shall purchase from *X* a property for £50,000, we can trace the process to a moment at which *X* must have said to *A*, in effect, 'Will you give me £50,000 for my property?', and *A* has replied, 'I will'; or at which *A* has said to *X*, 'Will you let me have the property for £50,000?' and *X* has said, 'I will'. There are cases to which this analysis does not readily apply—the signature of a prepared agreement, the acceptance by two parties of terms suggested by a third. Such instances are sometimes reducible to question and answer in an elliptical form. If *A* and *X* are discussing the terms of a bargain, and eventually accept a suggestion made by *M*, there is probably a moment when *A*, or *X*, says or intimates to the other, 'I will accept if you will'. It would be unwise to push the analysis too far: but as a working method which, more often than not, enables us, in a doubtful case, to ascertain whether an agreement has in truth been reached between the parties, the analysis may usefully be retained.

Contract
may
originate
in Offer
and Ac-
ceptance

The process of offer and acceptance may take place in any one of three ways.

1. In the offer to make a promise followed simply by

How offer
and ac-
ceptance
must be
made

assent: this, in English law, applies only in the case of contracts under seal.

2. In the offer of a promise for an act; as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer.¹

3. In the offer of a promise for a promise; in which case, when the offer is accepted by the giving of the promise, the contract consists in outstanding obligations on both sides.

The foregoing modes of offer and acceptance need explanation.

Illustrations

1. The first is, in English law, applicable only to such contracts as are made under seal; for no promise, not under seal, is binding unless the promisor obtains something from the promisee in return for his promise. This something, which may be an act, a forbearance, or a promise, is called Consideration.

Infra,
pp 84
et seq.

2. A man who loses his dog offers by advertisement a reward of £5 to anyone who will bring the dog safe home; he offers a promise for an act; and when X, knowing of the offer, brings the dog safe home the act is done and the promise becomes binding.

3. A offers X to pay him a certain sum on a future day if X will promise to perform certain services for him before that day. When X makes the promise asked for he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to pay for it.

Difference between contracts on executed and executory considerations

It will be observed that case (2) differs from (3) in an important respect. In (2) the contract does not come into existence until one party to it has done all that he can be required to do. It is performance on one side which

¹ In such cases there is no contract until the promisee has completed the performance of the act. The Law Revision Committee has recommended that 'a promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed'.

makes obligatory the promise of the other; the outstanding obligation is all on one side. In (3) each party is bound to some act or forbearance which, at the time of entering into the contract, is future: there is an outstanding obligation on each side. Each party here is both a promisor and also a promisee.

Where, as in case (2), it is the doing of the act which concludes the contract, then the act so done is called an 'executed'¹ (i.e. present) consideration' for the promise. Where a promise is given for a promise, each forming the consideration for the other, each such consideration is said to be 'executory' or future.

§ 1. *An Offer or its Acceptance or both may be made either by words or by conduct*

The description which has been given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words, in offer, in acceptance, or in both. The intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.

But it is important to note that the test of a man's intention is not a subjective, but an objective, one; that is to say, this intention which the law will attribute to a man is always that which his conduct bears when reason-

Upton-on-Severn
R D C. v.
Powell
[1942] 1 All
E.R. 220

¹ The words 'executed' and 'executory' are used in three different senses in relation to Contract, according to the substantive with which the adjective is joined.

'Executed consideration' as opposed to 'executory' means *present* as opposed to *future*, an *act* as opposed to a *promise*.

'Executed contract' is a term which has been used to denote a contract performed wholly on one side, while an 'executory contract' is one which is either wholly unperformed or in which there remains something to be done on both sides. But the meaning of these terms cannot be said to be well established, and they are best avoided.

'Executed contract of sale' means a bargain and sale which has passed the property in the thing sold, while 'executory contracts of sale' are contracts as opposed to conveyances, and create rights *in personam* to a fulfilment of their terms instead of rights *in rem* to an enjoyment of the property passed.

Parke B.,
in Foster v.
Dawber,
6 Exch. at
p. 851

ably construed, and not necessarily that which was present in his own mind.

Offer and
acceptance by
conduct

Paynter v.
Williams,
1 C. & M. 810

If *A* allows *X* to work for him under such circumstances that no reasonable man would suppose that *X* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer, the permission to do it, or the acquiescence in its being done, constitutes the acceptance.

Steven v.
Bromley,
[1919]
2 K.B. 722

The charterers of a ship agreed to load a cargo of steel billets at a certain rate of freight. Nearly half the cargo tendered by them and accepted for shipment consisted of general merchandise, for which the current rate of freight was substantially higher than the rate for steel billets agreed on under the charter. It was held that the proper inference from these facts was that the parties had made a fresh contract; the charterers by their conduct had requested the shipowner to carry a substituted cargo on the terms that they would pay the current rate of freight for cargo of that description, and the shipowner had accepted their offer and was entitled to the higher rate for that part of the cargo.

Sometimes, however, the inference from conduct is not so clear, but the conduct of the parties may be inexplicable on any other ground than that they intended to contract. In the case of *Crears v. Hunter*, *X*'s father was indebted to *A*, and *X* gave to *A* a promissory note for the amount due with interest payable half-yearly at five per cent. *A* thereupon forbore to sue the father for his debt. The father died, and *A* sued *X* on the note. Was there evidence to connect the making of the note with the forbearance to sue? In other words, did *X* offer the note in consideration of a forbearance to sue?

19 Q B D.
345

'It was argued,' said Lord Esher, M. R., 'that the request to forbear must be express. But it seems to me that whether the request is express or is to be inferred from circumstances is a mere question of evidence. If a request is to be implied from circumstances it is the same as though there was an express request.'

The Court of Appeal held that the jury were entitled to infer a contract in which *X* made himself responsible for the debt if *A* would give time to the debtor.

§ 2. *An offer is made when, and not until, it is communicated to the offeree*

This rule is not the truism that it appears.

(a) *X* offers a promise for an act. *A* does the act in ignorance of the offer. Can he claim performance of the promise when he becomes aware of its existence?

Offer
must be
communi-
cated

The answer is not really in doubt, though there seems to be no English case which exactly decides it. A case which has sometimes been regarded as creating some difficulty, *Williams v. Carwardine*, really only shows that *A*'s motive in doing the act is immaterial, for one report of the case shows that the plaintiff there did know of the offer when she gave the information which it asked for. But an American case—*Fitch v. Snedaker*—is directly in point. It is there laid down that a reward cannot be claimed by one who did not know that it had been offered. The decision is undoubtedly correct in principle. One who does an act for which a reward has been offered in ignorance of the offer cannot say either that there was a *consensus* of wills between him and the offeror, or that his conduct was affected by the promise offered. On no view of contract could he set up a right of action.

4 B & Ad.
621
5 C & P. 566

38 N Y. 248

(b) *A* does work for *X* without the request or knowledge of *X*. Can he sue for the value of his work?

A man cannot be forced to accept and pay for that which he has had no opportunity of rejecting. In such circumstances acquiescence cannot be presumed from silence. Where the offer is not communicated to the party to whom it is intended to be made, there is no opportunity of rejection; hence there is no presumption of acquiescence.

Silence
does not
give con-
sent,
where
offer is un-
communi-
cated

Taylor was engaged to command Laird's ship; he threw up his command in the course of the expedition, but helped to work the vessel home, and then claimed reward

Taylor v.
Laird, 25
L.J. Ex. *per*
Pollock, C.B.
at p. 332

for services thus rendered. It was held that he could not recover. Evidence 'of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time the defendant had power to refuse or accept the services*'. Here the defendant never had the option of accepting or refusing the services while they were being rendered; and he repudiated them when he became aware of them. The plaintiff's offer, being uncommunicated, did not admit of acceptance and could give him no rights against the party to whom it was addressed. 'Suppose,' said Pollock, C.B., 'I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?'

Forman v
Liddesdale,
[1900] A.C.
190

The principle is the same when a defendant is asked to pay for work which is not in accordance with the terms of a contract and which he has had no opportunity given him of deciding to accept or reject. Where a ship-repairer agreed for a lump sum to repair a ship, and not only did the work agreed upon in a manner which departed materially from the terms of his contract but also did a good deal more than was agreed upon without any authority from the shipowner, it was held that he could recover nothing. He could not recover under the original contract, because he had not performed it; nor under a substituted contract because the ship-owner had not agreed to any substituted performance; nor could any agreement be inferred from the fact that the defendant had received his ship back and kept her. The ship was his own property and he had no option but to take her back in the condition in which the plaintiff had left her, and to make the best of circumstances which had arisen through no fault of his own.

Offer with
numerous
terms

(c) Where an offer consists of various terms, some of which do not appear on the face of it, to what extent is an acceptor bound by terms of which he was not aware?

Railway companies, for instance, make offers to carry passengers or to take care of goods on certain conditions.¹ The traveller who takes a ticket for a journey, or for luggage left at a cloak-room, accepts an offer containing many terms. A very prudent man with abundance of leisure would perhaps inquire into the terms before taking a ticket. Of the mass of mankind some know that there are conditions and assume that they are fair, while the rest do not think about the matter.

Prima facie a person cannot be said to have agreed to terms in a contract of which he was not even aware. On the other hand, if he has exhibited the ordinary external signs of assenting to certain terms, the law will regard him as having assented to them and will hold him to them as part of the bargain. When therefore a contract is alleged to have been made by the delivery by one party to the other of a document stating the terms on which that party will enter into the proposed contract, and this document has been accepted without objection by the person to whom it is tendered, we have to ask whether the reasonable inference to put upon the conduct of the latter is or is not that he has accepted all the terms which the document contains.

We cannot lay down as a rule of law that such an inference is *always* to be drawn from the fact of accepting a document containing terms, though the cases in which it is not to be drawn are exceptional. But there are circumstances of two rather different kinds which may prevent the inference being drawn.

In the first place the transaction may be of a kind which, regard being had to the ordinary course of business, the person receiving the document might expect to be made without special conditions at all; he may, for instance, be justified in assuming that the document is a mere voucher

¹ The conditions under which the liability of a Railway Company in respect of the carriage of goods can be limited, under the Railway and Canal Traffic Act, 1854, and subsequent legislation, are a matter too special to be discussed here.

2 C.P.D. 426 or receipt. In *Parker v. South-Eastern Railway Company* the Court regarded the deposit of luggage in a cloak-room as a transaction of this kind, and held that the conditions which the document handed to the depositor contained would be part of the contract only if the Company had done what was reasonably sufficient to give him notice of them. The case was decided in 1877, and it may be that, if the same facts arose to-day, the transaction would be differently regarded. It is probably now a matter of common knowledge that the document handed to a passenger depositing luggage is not a mere voucher; in fact in *Chapelton v. Barry R.D.C.* MacKinnon, L. J., actually uses this document as a typical illustration of one which is not a mere receipt, but contains the terms of a contract. But the judgment of the Court of Appeal in *Parker v. S.E.R.* is still a leading authority on the principles to be applied in these cases.

[1940]
1 K.B. at
p. 538

Secondly, even if the document is one which the person receiving it must be assumed to expect to contain terms, yet it may be defective in the manner in which it calls attention to the terms which it purports to incorporate in the contract. Thus in *Henderson v. Stevenson* the plaintiff bought a steamer ticket on the face of which were these words only, 'Dublin to Whitehaven'; on the back was an intimation that the defendant Company incurred no liability for loss, injury, or delay to the passenger or his luggage. The vessel was wrecked by the fault of the Company's servants and the plaintiff's luggage lost. The House of Lords decided that the Company was liable to make good the loss, since the plaintiff could not be held to have assented to a term 'which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed and written upon the face of the contract presented to him'. But it has been pointed out that this case was decided many years ago, and on its special facts. If the Company had taken the now usual precaution of printing on the face

L.R. 2 H.L.
Sc App 470

Sugar v.
L.M.S. Ry.
Co. [1941]
1 All E.R.
172

of the ticket the words 'For conditions see back', the result would, at any rate to-day, have been different, and the conditions would have been incorporated into the contract.

The question whether all that is reasonably necessary to give notice has been done is a question of fact, 'in answering which the tribunal must look at all the circumstances and the situation of the parties', but in this, as in all questions of fact, it is for the Court to decide, as a matter of law, whether there is evidence to go before the jury. The Court of Appeal has drawn the distinction already referred to between cases of the type of *Parker v. S.E.R.*, where the person accepting the document may reasonably look on it as a mere voucher or receipt, and therefore as not containing any special condition to which his attention is to be drawn, and those in which, regard being had to the ordinary course of business, any reasonable person knows that the contract is not ordinarily made without conditions. The traveller who takes a ticket for a railway journey containing on its face the usual reference to the conditions under which it is issued is a case in point, and in such cases, where a document in a common form is tendered by one party and accepted by the other, the latter is as a general rule bound by its contents, whether he reads the document or otherwise informs himself of its contents or not.¹ The mere fact that the conditions referred to in the document are far to seek and cannot be discovered by the person accepting it without a considerable search does not of itself afford evidence of the absence of reasonable notice which is fit to be left to the jury.²

Hood v.
Anchor Line
[1918] A.C.
per Lord
Haldane
at p. 844

Thompson
v. L.M.S.
Ry. Co.,
[1930]
1 K B 41
Penton v.
S. Ry. Co.,
[1931]
2 K B. 103

¹ The rule was laid down in substantially these terms, and the older cases were carefully summarized by Stephen, J., in *Watkins v. Rymill*. 10 Q.B.D.
178

² The traveller who for social or commercial reasons desires to get reasonably swiftly and cheaply from one place to another must ordinarily use the railway. Before contracting he can, though not always very easily, find out the terms on which the Company will carry him, or on which it will receive his luggage into a cloak-room; but he cannot alter those terms or even discuss them; they are there for him to take or leave. He therefore does not undertake the laborious and profitless

Excep-
tional
nature of
offer under
seal

Infra, p. 45

There is one exception to the inoperative character of an uncommunicated offer: this is the case of an offer under seal. But this matter is best dealt with under the head of the revocation of offers.

§ 3. *Acceptance must be made by words or conduct*

Acceptance means in general communicated acceptance. What amounts to communication, and how far it is necessary that communication should reach the offeror, are matters to be dealt with presently. It is enough to say here that acceptance must be something more than a mere mental assent.

In an old case it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the property passed when he had seen and approved of the subject of the sale. But Brian, C. J., said:

Year Book,
17 Ed. IV. 1

'It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that

task of discovering what the terms are. Yet if he suffers an injury he may find that the terms of the contract so limit the liability of the Company that he has no redress even for the Company's own negligence.

Gibaud v.
G.E. Ry. Co.,
[1920] 3 K.B.
689

This is the situation with which the courts have had to deal in the 'ticket' cases, and to which they have necessarily applied the ordinary principles of the law of Contract. They have asked, 'What are the terms to which the traveller, even if he has not assented in fact, must be deemed to have assented?' and they have replied that he must be deemed to have assented to those terms of which he has had reasonable notice. They have even added for his additional protection that the terms must not be so unreasonable as to amount to fraud, or manifestly irrelevant to the object of the contract. But these alleviations do not go to the root of the matter, which is that the principles of Contract law are not capable of providing a just solution for a transaction in which freedom of contract notoriously exists on one side only. Such contracts have been described as 'of a rather artificial nature', made in 'a rather artificial way', and that is, if anything, an understatement.

Viscount
Caldecote in
Sugar v
L.M.S. Ry.
Co., [1942]
1 All E.R.
172

Railway companies perform a public service, and in return they enjoy a virtual monopoly. It seems fair that the legislature should insist that the terms on which they offer to contract with the public should be just and reasonable. The question of reasonableness might be left to the courts, or the terms might be made subject to the approval of the Minister of Transport. The present system, under which the companies are free to exclude liability for their own negligence, provided only that they quote an alternative rate (which in practice they do not expect the public to use) seems neither just nor reasonable.

Clarke v.
West Ham
Corporation,
[1909] 2 K.B.
858

the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.'

This *dictum* was quoted with approval by Lord Blackburn in the House of Lords in support of the rule that a contract is formed when the acceptor has done something to signify his intention to accept, not when he has made up his mind to do so.

Two cases show that mental or uncommunicated consent does not amount to acceptance; and this is so even where the offeror has said that such a mode of acceptance will suffice.

Brogden v. Metro. Ry.
Co. 2 App.
Cas. 692

Mental
accept-
ance in-
effectual

Felthouse offered by letter to buy his nephew's horse for £30 15s., adding, 'If I hear no more about him I shall consider the horse is mine at £30 15s.' No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as it was sold to his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property. The Court held that as the nephew had never signified to Felthouse his acceptance of the offer, there was no contract of sale, and that the horse did not belong to Felthouse at the time of the auctioneer's dealings with it.

Felthouse v. Bindley, 11
C.B., N.S.
869

In *Powell v. Lee* the plaintiff was a candidate for the head-mastership of a school, and the board of managers, with whom the appointment lay, passed a resolution selecting him for the post. One of the managers, acting in his individual capacity, informed the plaintiff of what had occurred, but he received no other intimation. Subsequently, the resolution was rescinded and the Court held that in the absence of an authorized communication from the whole body of managers there was no completed contract.

99 L.T. 284

§ 4. *An offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror*

Effect of
Accept-
ance

A contract is formed by the acceptance of an offer. When the offer is accepted it becomes a promise: till it is accepted neither party is bound, and the offer may be revoked by due notice of revocation to the party to whom it was made. Acceptance is necessarily irrevocable, for it is acceptance that binds both the parties.

Communi-
cation of
Accept-
ance

We have seen that the acceptance of an offer requires more than a tacit formation of intention. There must be some overt act or speech to give evidence of that intention. But there is this marked difference between Offer and Acceptance, that whereas an offer is not held to be made until it is brought to the knowledge of the offeree, acceptance may in certain circumstances be held to be made though it has not come to the knowledge of the offeror.

In such cases two things are necessary. There must be an express or implied intimation from the offeror that a particular mode of acceptance will suffice. And some overt act must be done or words spoken by the offeree which are evidence of an intention to accept, and which conform to the mode of acceptance indicated by the offeror.

The law on this subject was thus stated by Bowen, L. J., in the *Carbolic Smoke Ball* case:

Infra, p. 59

[1893] 1 Q.B.
269

'One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that *consensus* which is necessary according to the rules of English law—I say nothing about the laws of other countries—to make a contract. But there is thus clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so: and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such an offer is made to follow the indicated mode

of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification.'

From this statement of the law we may draw the following conclusions.

The offeror may indicate a mode in which acceptance should be communicated, and he will then be bound by a communication so made, whether it reaches him or not; or the offeror may invite performance without communication of acceptance, and it will then be sufficient for the purpose of binding him that the offeree should 'act on the proposal'.

Depends
on terms
of offer

In either case we start with the general principle that acceptance must be communicated to the offeror, and we must then look to the terms and the nature of the offer, and ascertain whether the offeror has committed himself to a particular mode of acceptance, or has invited the offeree to act on the proposal and accept by performance.¹

We will take the latter class of cases first. It is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract. This is specially true of what are called general offers, offers made to unascertained persons, wherein performance is expressly or impliedly indicated as a mode of acceptance. An offer of reward for the supply of information or for the recovery of a lost article does not contemplate an intimation of acceptance from every person who, on becoming aware of the offer, decides to search for the information or for the article: he may have already found or become possessed of the thing required, and can do no more than send it on to the offeror.

Offer of
promise
for act,

to unas-
certained
persons,

But when a specified individual receives an offer capable of acceptance by performance we need to consider more carefully the nature and terms of the offer, and whether they entitle the offeree to dispense with notice of acceptance.

to an indi-
vidual

Harvey v.
Johnston,
6 C.B. at
p. 304

Kennedy v.
Thomassen,
[1929] 1 Ch.
426

Offer of
promise
for pro-
mise

Offer de-
termines
mode of
accept-
ance

Household
Fire Ins. Co.
v. Grant, 4
Ex. D. 216,
233

If *A* tells *X* by letter that he will receive and pay for certain goods if *X* will send them to him, such an offer may be accepted by sending the goods. But if the trustees of a will inform an annuitant under it that they offer to redeem her annuity for cash, and she thereupon, without further communication with them, executes a release of the annuity, no contract for the sale and purchase of the annuity is concluded. As the Court pointed out, it was impossible to suppose that the purchasers intended their offer to be accepted by the vendor merely executing a document; communication to them of the acceptance was necessary.

When we pass from offers of a promise for an act to offers of a promise for a promise, that is, from offers capable of being accepted by performance to offers which require for their acceptance an expression of intention to accept, we need no longer consider whether the offeror asks for any notification at all, but must ask how far he has bound himself as to the mode in which the acceptance should be communicated. If he requires, or suggests, a mode of acceptance which proves, as a means of communication, to be nugatory or insufficient, he does so at his own risk. Suppose that *X* sends an offer to *A* by messenger across a lake with a request that *A* if he accepts will at a certain hour fire a gun or light a fire. Why should *A* suffer if a storm render the gun inaudible, or a fog intercept the light of the fire? If *X* sends an offer to *A* by messenger with a request for a written answer by bearer—is it *A*'s fault if the letter of acceptance is stolen from the bearer's pocket?

Such a principle is no doubt reasonable enough in itself. But is it fair to apply it to the common case of an offer made through the post, and to say that the offeror has thereby indicated the post as the means by which the acceptance is to be communicated to him, and has taken the risk of it proving effective? This is the view which has been taken in our law. 'The post office is the ordinary

mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner.'

To understand the steps by which this result has been reached we must bear in mind that an offer made to one who is not in immediate communication with the offeror remains open and available for acceptance until the lapse of such a time as is prescribed by the offeror, or is reasonable as regards the nature of the transaction. During this time the offer is a continuing offer and may be turned into a contract by acceptance. This is clearly laid down in *Adams v. Lindsell*. Lindsell offered to sell wool to Adams by letter dated 2nd Sept. 1817, 'receiving your answer in course of post'. An answer might have been received on the 7th if the letter containing the offer had been properly directed; but it was misdirected and did not reach Adams till the 5th, and his acceptance, posted on the same day, was not received by Lindsell till the 9th. On the 8th, that is, before the acceptance had arrived, Lindsell sold the wool to others. Adams sued for a breach of the contract made by the letters of offer and acceptance, and it was argued on behalf of Lindsell that there was no contract between the parties till the letter of acceptance was actually received. But the Court said:

Accept-
ance of
offer by
post

1 B & Ald.
681

'If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.'

Adams v. Lindsell establishes two points, first that the offer remains open for acceptance during a time prescribed by the offeror or reasonable under the circumstances; and secondly, that an acceptance in the mode indicated by the offeror concludes the contract.

Effect of
lost ac-
ceptance

Dunlop v.
Higgins,
1 H.L.C. 381

Colson's
case, L.R. 6
Ex. 108

Harris' case,
L.R. 7 Ch.
587

4 Ex.D. 216

The Courts showed some hesitation in applying this rule to cases where the letter of acceptance had been lost or delayed in transmission, but the matter is now settled by the decision in *Household Fire Insurance Co. v. Grant*. An offer was made to take shares in circumstances indicating that the answer was to come by post: it was accepted by letter; the letter never reached the offeror, but the Court of Appeal held that he was nevertheless liable as a shareholder:

'As soon as the letter of acceptance is delivered to the post office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance.'

This is to treat the post office as the agent of the offeror, not only for delivering the offer, but for receiving the notification of its acceptance, and there is a certain artificiality in looking on the transaction in that way. Both parties would probably be surprised, unless they were lawyers, to learn that that is how the law regards it, for the post so seldom goes wrong in fact that the possibility that it may do so does not enter into the ordinary calculations of persons who use it for the conduct of their negotiations. On the other hand, if hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived, whether or not it can be logically justified, is probably as satisfactory as any other would be. In the later case of *Henthorn v. Fraser*, where a written offer, delivered by hand, was accepted by post, and it was held that the contract was concluded from the moment of such acceptance, Lord Herschell merely says:

'I should prefer to state the rule thus: where the circumstances are such that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'

Re London
& Northern
Bank, [1900]
1 Ch. 220

Delivery into the hands of a postman, however, is not the same as posting a letter, for it is not his business to

[1892] 2 Ch.
27, 33

receive letters for the post outside his ordinary duty of collection. So when X had offered by post to take an allotment of shares, and the letter of allotment had been made out and handed to a postman to post, but not posted by him until a revocation of X's offer had reached the offeree, it was held that there had been no communication of acceptance and that the revocation was good.

Offeror determines mode of acceptance, and takes the risk

There is no lack of authority to show that if an acceptance is made in a manner other than that indicated by the offeror it is not communicated. Hebb applied to the agent of a company for shares; the directors allotted shares to him, but sent the allotment letter to their own agent for transmission to Hebb. Before the agent delivered the letter Hebb withdrew his offer. It was held that 'if Mr. Hebb had authorized the agent of the company to accept the allotment on his behalf there would have been a binding contract, but he gave no such authority'. Communication by the directors to their own agent was no communication to Hebb. Consequently he was entitled to withdraw his offer.

Hebb's case, L R. 4 Eq 9
See, too, Eliason v Henshaw, *infra*, p 41

The rule that a contract is made *when* the acceptance is communicated involves as a result the further rule that a contract is made *where* the acceptance is communicated. This may be of importance when we inquire, as is sometimes necessary, what is the law which governs the validity of the contract or the procedure by which it may be enforced.

Place of acceptance

In *Cowan v. O'Connor* a contract was made by two telegrams—one of offer and one of acceptance. The amount at issue made it necessary that the whole cause of action should arise within the jurisdiction of the Court (the Mayor's Court in the City of London) in which the action was to be tried. The telegram of acceptance had been sent from the City, and the Court held that the contract was there made, and that consequently the whole cause of action arose within the jurisdiction of the Mayor's Court.

20 Q.B D 640

There is a result following from the foregoing decisions

Can acceptance be revoked?

which has been the subject of criticism. Acceptance concludes the contract; so if acceptance takes place when a letter is put into the post office, a telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter. It is not easy to see how the English courts could now decide otherwise. Nor is it easy to see that any hardship need arise from such a conclusion. The offeree need not accept at all: or he may send a qualified acceptance, 'I accept unless you get a revocation from me by telegram before this reaches you': or he may telegraph a request for more time to consider. If he chooses to send an unconditional acceptance there is no reason why he should have an opportunity of changing his mind which he would not have enjoyed if the contract had been made *inter praesentes*.

§ 5. *Offer creates no legal rights until acceptance, but may lapse or be revoked*

Lapse and revocation of offer

Acceptance is to Offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have lain till it has become damp, or the man who laid the train may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance. Acceptance converts the offer into a promise, and it is then too late to revoke it.

Lapse

Death of parties
Kennedy v. Thomassen,
[1929]
1 Ch. 426

(a) The death of either party before acceptance causes an offer to lapse. An acceptance communicated to the representatives of the offeror cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate.

(b) It has been shown that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.

If the terms or the circumstances of the offer do no more than suggest a mode of acceptance, it seems that the offeree would not be bound to this mode so long as he used one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or the suggested method of communication would probably throw on the offeree the burden of ensuring a notification of his acceptance. Subject to this an offer made by post might be accepted by telegram, or by messenger sent by train.

Failure to
accept in
manner
pre-
scribed;

But if a mode of acceptance is prescribed and the offeree departs from this, it is open to the offeror to treat the acceptance as a nullity.

Eliason offered to buy flour of Henshaw, requesting that an answer should be sent by the wagon which brought the offer. Henshaw sent a letter of acceptance by mail, thinking that this would reach Eliason more speedily. He was wrong, and the Supreme Court of the United States held that Eliason was entitled to refuse to purchase.

Eliason v.
Henshaw,
4 Wheaton,
225

'It is an undeniable principle of the law of contract, that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it.'

(c) Sometimes the parties fix a time within which an offer is to remain open; more often it is left to a court of law, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. Instances of a prescribed time are readily supplied. 'This offer to be left open till Friday, 9 a.m. 12th June', allows the offeror to revoke, or the offeree to accept the offer, if unrevoked, at any time up to the time named, after which the offer would lapse.

or within
time pre-
scribed

Dickinson v.
Dodds,
2 Ch.D. 463

An offer to supply goods of a certain sort at a certain price for a year from the present date—an offer to guarantee the payment of any bills of exchange discounted for a third party for a year from the present date—are offers

G.N.R. Co.
v. Witham,
L.R. 9 C.P.
16
Offord v.
Davies, 12
C.B., N.S.
748

which may be turned into contracts by the giving of an order in the one case, the discount of bills in the other. Such offers may be revoked at any time, except as regards orders already given or bills already discounted, and they will in any event lapse at the end of a year from the date of offer.

A promise to keep an offer open would need consideration to make it binding and would only become so if the party making the offer were to get some benefit by keeping it open or the offeree to incur some detriment in respect of the promise to keep the offer open.¹ The offeree in such a case is said to 'purchase an option': that is, the offeror, in consideration usually of a money payment, binds himself not to revoke his offer during a stated period. In this case the offeror by his promise precludes himself from exercising his right to revoke the offer; but where he receives no consideration for keeping the offer open, he says in effect, 'You may accept within such and such a time, unless in the meantime I have revoked the offer, and you have become aware of my revocation from a reliable source'.

L. R. 1 Exch.
109

An instance of an offer lapsing by the efflux of a reasonable time is supplied by the case of the *Ramsgate Hotel Co. v. Montefiore*. Montefiore offered by letter dated the 28th of June to purchase shares in the Company. No answer was made to him until the 23rd of November, when he was informed that shares were allotted to him. He refused to accept them, and it was held that his offer had lapsed by reason of the delay of the Company in notifying their acceptance.

Revocation

Revoca-
tion:

- (1) An offer may be revoked at any time before acceptance.
- (2) An offer is made irrevocable by acceptance.

¹ The Law Revision Committee has recommended that 'an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration'.

(1) The first of these statements is illustrated by the case of *Offord v. Davies*. Messrs. Davies made a written offer to Offord that, if Offord would discount bills for another firm, they (Messrs. Davies) would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months.

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valid
before ac-
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Some bills were discounted by Offord, and duly paid, but before the twelve months had expired Messrs. Davies, the guarantors, revoked their offer and notified Offord that they would guarantee no more bills. Offord continued to discount bills, some of which were not paid, and then sued Messrs. Davies on the guarantee. It was held that the revocation was a good defence of the action. The alleged guarantee was an offer, for a period of twelve months, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regards discounts made before notice of revocation.

(2) The second statement is illustrated by the *Great Northern Railway Company v. Witham*, a transaction of the same character. The Company advertised for tenders for the supply of such iron articles as they might require between 1st November 1871 and 31st October 1872. Witham sent in a tender to supply the articles required on certain terms in such quantities as the Company 'might order from time to time', and his tender was accepted by the Company. Orders were given and executed for some time on the terms of the tender, but after a while Witham refused to execute orders. The Company sued him for non-performance of an order already given and he was held liable.

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useless
after ac-
ceptance

It is important to note the exact relations of the parties. The Company by advertisement invited all dealers in iron to make tenders, that is, to state the terms of the offers which they were prepared to make. The tender of Witham stated the terms of an offer which might be accepted at any time, or any number of times, in the ensuing twelve months.

The acceptance of the tender did not in itself make a contract; it was merely an intimation by the Company that they regarded Witham's tender as a standing offer which on their part they would be willing as a matter of business to accept, as and when they required the articles to be supplied. The Company was not bound to order any iron: and, though this point was left open by the Court, it is conceived that Witham might, at any time before an order was given, have revoked his offer by notice to the Company (unless for good consideration, such as a promise by the Company to purchase iron from no one else, he had bound himself not to do so for the whole twelve months): but each order given was an acceptance of Witham's standing offer, and bound him to supply so much iron as the order comprised. An order given after 31st October 1872 would have been an acceptance after the prescribed time, and inoperative.

In this class of case much turns on the forms of invitation, tender, and acceptance actually adopted by the parties, and for that reason the decisions of the Courts upon them appear sometimes difficult to reconcile. The legal relations which may result from the acceptance of a tender are classified thus by Atkin, J.:

Percival,
Ltd. v.
L.C.C., 87
L.J.K.B.
677

R. v. De-
mers, [1900]
A.C. 103

'It is quite common for large bodies that require supplies over a year to ask for tenders and to obtain them, and it sometimes happens that the effect of the form of the tender with an acceptance is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, one knows that these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all; in other words the contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound. There is also an intermediate contract that can be made, in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course, if there is a contract such as that, then there is a binding contract which will be broken if the purchasing body in fact do

need some of the articles the subject of the tender, and do not take them from the tenderer.'

An exception to this general rule as to the revocability of an offer must be made in the case of an offer under seal. It is said that this cannot be revoked: and that even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence.

Offer under seal is irrevocable

There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if the deed has been duly 'delivered';¹ and it would seem that an offer by deed is on the same footing. The offeror is bound, but the offeree need not take advantage of the offer unless he choose; he may reject it, and it then lapses.

Macedo v. Stroud, [1922] 2 A.C. 330

The situation in such a case is anomalous. It is in fact irreconcilable with the modern analysis of Contract as meaning an expression by at least two persons of a common intention whereby expectations are created in the mind of one or both.

An offer under seal is *factum*, a thing done beyond recall; and the offeror is in the position of one who has made an offer which he cannot withdraw, or a conditional promise depending for its operation on the assent of the promisee.

It remains to state that Revocation, as distinguished from Lapse, if it is to be operative, must be communicated. In the case of Acceptance we have seen that it is operative, and the contract made, if the offeree does by way of acceptance that which the offeror has directly or indirectly indicated as sufficient. The posting of a letter, the doing of an act, may constitute an acceptance and make a contract. The question arises, Can revocation of an offer be communicated in the same way, by the posting of a letter of revocation, by the sale to *A* of an article offered to *B* for purchase?

Revocation must be communicated

¹ 'Delivery' of a deed does not necessarily involve the handing of it over to the other party to the contract; *infra*, p. 61.

There can be no real doubt that revocation of an offer is not communicated unless brought to the knowledge of the offeree. The rule of law on this subject was settled in *Byrne v. Van Tienhoven*. The defendant, writing from Cardiff on October 1st, made an offer to the plaintiff in New York asking for a reply by cable. The plaintiff received the offer on the 11th, and at once accepted in the manner requested. On the 8th the defendant had posted a letter revoking the offer.

The questions which Lindley, J., considered to be raised were two. (1) Has a revocation any effect until communicated? (2) Does the posting of a letter of revocation amount to a communication to the person to whom the letter is sent?

He held (1) that a revocation was inoperative until communicated, (2) that the withdrawal of an offer was not communicated by the mere posting of a letter; and that therefore an acceptance made by post is not affected by the fact that a letter of revocation is on its way. He pointed out the inconvenience which would result from any other conclusion:

‘If the defendant’s contention were to prevail no person, who had received an offer by post and had accepted it, would know his position until he had waited such time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.’

[1892] 2 Ch.
27 The case of *Henthorn v. Fraser*, decided in the Court of Appeal, extends this rule to the case of a written offer delivered by hand and accepted by post. Lord Herschell there said:

‘The grounds on which it has been held that the acceptance of an offer is complete when it is posted, have I think no application to the revocation or modification of an offer. These can be no more effectual than the offer itself unless brought to the mind of the person to whom the offer is made.’

•

The case of *Dickinson v. Dodds* has been thought to suggest that when the offer is an offer to sell property it may be revoked merely by the sale of the property to a third person, and without communication to the offeree.

Cases conflicting with this rule

The case was a suit for specific performance of a contract under the following circumstances. On the 10th of June, 1874, Dodds gave to Dickinson a memorandum in writing containing an offer to sell certain premises, and stating that it would remain open until 9 a.m. on the 12th. On the 11th he sold the property to another person without notice to Dickinson. As a matter of fact Dickinson was informed of the sale, though not by anyone acting under the authority of Dodds. He gave notice, after the sale but before 9 o'clock on the 12th, that he accepted the offer to sell, and sued for specific performance of what he alleged to be a contract.

Dickinson v. Dodds, 2 Ch.D. 463

The Court of Appeal held that there was no contract. James, L. J., after stating that the promise to keep the offer open could not be binding, and that at any moment before a complete acceptance of the offer one party was as free as the other, went on to say:

'It is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "now I withdraw my offer". I apprehend that there is neither principle nor authority for the proposition that there must be an actual and express withdrawal of the offer, or what is called a retraction. It must to constitute a contract appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, *beyond all question, the plaintiff knew* that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer".'

at p 472

If this language was intended to suggest that a revocation in fact of an offer without the knowledge of the offeree would avail against an acceptance by the offeree within the prescribed time, it must be regarded as overruled by

subsequent decisions. But the language is open to the construction that the Court treated the question of the offeree's knowledge of the revocation as wholly one of fact and were satisfied in the case before them that he knew, when he accepted, that the offer had already been withdrawn.

But must we hold that knowledge of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? If this is correct the inconvenience might be grave. Suppose a merchant to receive an offer of a consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. Meantime an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then, if he accepts, his acceptance would be worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting he may lose a good bargain.

Dickinson v. Dodds is no authority for the validity of an uncommunicated revocation: but it does raise a question as to the effect of an unauthorized notice of revocation. The answer appears to be that it is open to an offeror, who has revoked an offer without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer was withdrawn. The Court would thus decide every such case on the facts presented; and that this is the true explanation of *Dickinson v. Dodds* is borne out by the later decision in *Cartwright v. Hoogstoel*, where the facts were almost exactly similar, and which seems to be the only other case in which the point has come up for consideration.

105 L.T. 628

§ 6. *The offer must be one which in its natural meaning may be taken to contemplate, and which is capable of creating, legal relations*

Offer must
be in-
tended to
create
legal
relations

An offer, in order that it may be made binding by acceptance, must be one which can be reasonably regarded

as having been made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was made. In an old case, the defendant said, in conversation with the plaintiff, that he would give £100 to him who married his daughter with his consent. Plaintiff married defendant's daughter with his consent, and afterwards brought an action on the alleged promise. It was held that it is not reason that the defendant 'should be bound by general words spoken to excite suitors'.

Weeks v. Tybald, Noy, 11

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. On this footing stand engagements of pleasure, or agreements which from their nature do not admit of being regarded as business transactions. We cannot always say that the reason why such engagements are not to be regarded as contracts is because they are not reducible to a money value, for they often may be. The acceptance of an invitation to dinner or to play in a cricket match, of an offer by a husband to a wife to pay a certain sum each week as a household allowance, form agreements in which the parties may incur expense in the fulfilment of their mutual promises. The damages resulting from breach might be ascertainable, but the Courts would probably hold that, as no legal consequences were contemplated by the parties, no action would lie.

Balfour v Balfour
[1919] 2
K B 571

In *Rose and Frank v. Crompton* we have a different and exceptional class of case, in which the parties to a business transaction deliberately stated that they did not intend to enter into any legal obligation at all. The defendants, a British firm of manufacturers, had had business dealings for some years with the plaintiffs, an American firm. A document was drawn up by which it was in effect arranged that the plaintiffs were to be the sole vendors of the defendants' goods in the United States; it contained detailed arrangements for carrying out the business, and proceeded

[1925]
A C 145

to state that 'this arrangement is not entered into nor is this memo written as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the United States or England'. A dispute having arisen, the defendants terminated the agreement without notice and contrary to its terms, and refused to carry out certain accepted orders then outstanding. The plaintiffs therefore sued them for breach of contract and for non-delivery of goods. It was held that the document was not legally binding, and that the plaintiffs were not entitled to damages for breach of its terms, but that the orders already accepted under it constituted legally binding contracts and that they were entitled to damages for the non-delivery.

Atkin, L. J.
in [1923]
2 K B.
at p 293

'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour v. Balfour*. If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both.'

[1919]
2 K B 571

Appleton v.
Littlewood,
[1939] 1 All
E R 464

Similarly it has been held that a competitor who claimed to have sent in a very successful coupon in a football pool, of which one of the conditions was that the conduct of the pools and everything done in connexion therewith was not to 'be attended by or give rise to any legal relationship whatsoever' could have no claim which a Court would enforce.

It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to, result in any obligation *ex contractu* from offers which admit of acceptance, and so become binding promises. A man announces that he will sell goods by tender or by auction, or that he is prepared to pay money under certain conditions: or a railway company to carry passengers from *A* to *X* and to reach *X* and the intermediate stations at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and do business; whether the railway company by its published time-table makes offers which become terms in the contract to carry, or whether it states probabilities in order to induce passengers to apply for tickets.

Distinction between offer and invitation to treat

We may note the distinction in the following cases.

An invitation to compete for a scholarship does not import a promise that the scholarship will be given to the candidate who obtains the highest marks. Such an invitation could not reasonably be interpreted in that sense, for, apart from other possible objections, the examiners might report that he is not of sufficient merit to receive the scholarship.

Rooke v. Dawson,
[1895]
1 Ch. 480

An announcement that goods would be sold by tender, unaccompanied by words indicating that they would be sold to the highest bidder, was held to be 'a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt'.

Spencer v. Harding,
L.R. 5 C.P.
561

An advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale.

Harris v. Nickerson,
L.R. 8 Q.B.
286

'Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable.'

It was decided as long ago as 1789 that, when an auction

Payne v.
Cave, 3 T R.
148

is held, a bid is only an offer, which can be retracted at any time before the fall of the hammer. This rule has now been made statutory by s. 58 of the Sale of Goods Act, 1893. It is clear therefore that no contract for the sale of the goods comes into existence until a bid is accepted.

1 El & El
205, 309

There is, however, authority for saying that, when property is put up for sale by auction upon an advertised condition that the sale shall be 'without reserve', an auctioneer who refuses to accept the bid of the highest *bona fide* bidder makes himself liable for breach of a contract with such bidder. In *Warlow v. Harrison* the defendant, an auctioneer, advertised 'a brown mare, Janet Pride', for sale by auction 'without reserve'. The owner's name was not disclosed. The plaintiff attended the sale and bid 60 guineas; the owner then bid 61 guineas, and the defendant knocked down the mare to him. Warlow claimed the mare as being the highest *bona fide* bidder.

Infra,
p. 408

6 B. & S. 420

The Court of Exchequer Chamber thought that on these facts, if they had been properly pleaded, the plaintiff would be entitled to succeed, though the actual decision was to give him leave to amend his declaration with a view to a new trial, which never took place. Three judges, Martin, B., Byles, J., and Watson, B., compared the case to that of the loser of property offering a reward, and thought that the defendant was liable 'as upon a contract that the sale shall be without reserve'; the two remaining judges, Willes, J., and Bramwell, B., preferred to rest their decision on the ground 'that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve'. These two judges appear to have thought that the doctrine of 'warranty of authority', which will be more fully discussed later in this book, was applicable to the case. The decision was criticized by the Court of Queen's Bench in *Mainprice v. Westley*, but in that case, although the other facts were very similar to those in *Warlow v. Harrison*, the name of the auctioneer's principal had been disclosed, and the Court held that the

cause of action, if any, would be against the principal and not against the auctioneer. *Warlow v. Harrison* has been supported by dicta of Cozens Hardy, L. J., in two cases, but it is not easy to see what is the consideration for the supposed promise of the auctioneer.

Johnston v. Boyes,
[1899] 2 Ch.
at p. 77
McManus v. Fortescue,
[1907]
2 K.B. at
p. 6

A bookseller's catalogue, with prices stated against the names of the books, might seem to contain a number of offers. But if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer.

Grainger v. Gough,
[1896] A.C.
325, 334

In all these cases the same question presents itself under various forms. Is there an offer? And, to constitute an offer, the words used, however general, must be capable of being applied to a specific person who acts upon them and thus accepts the offer, and must be distinguishable from mere statements of intention, from invitations to transact business, and from advertisement or puffery which does not contemplate legal relations.

An offer, again, must be *capable* of creating legal relations. It is for the parties to see to it that the offer is such that, when it is accepted, a contract is formed; the Courts, as we have seen, will not construct a contract for them out of terms which are indefinite or illusory. *A* bought a horse from *X* and promised that 'if the horse was lucky to him he would give £5 more or the buying of another horse': it was held that such a promise was too loose and vague to be considered in a court of law.

Offer must
be cap-
able of
creating
legal
relations
Ante, p. 21

Guthing v. Lynn,
2 B. & Ad
232

A covenanted with *X* to retire wholly from the practice of a trade 'so far as the law allows': it was held that the parties must fix the limit of their covenant and not leave their agreement to be framed for them by the Court.

Davies v. Davies, 36
Ch. D. 359

A made a contract with *X* and promised that if 'satisfied with you as a customer' he 'would favourably consider' an application for a renewal of the contract: it was held

Montreal Gas Co. v. Vasey,
[1900] A.C.
595

that there was nothing in these words to create a legal obligation.

Falck v.
Williams,
[1900] A C
176

The plaintiff's agent made an offer to the defendant by telegraphic code, but owing to an unfortunate economy of words the parties understood it in different senses. The plaintiff tried to show that the offer was so clear that the defendant could not be heard to say that he misunderstood it, but the Court held that it was ambiguous and there was no contract.

§ 7. *Acceptance must be absolute, and must correspond with the terms of the offer*

Forms of
accept-
ance
which
are incon-
clusive

If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the correspondence of the terms of acceptance with those of the offer.

The kinds of difficulty which arise in determining whether or no an acceptance is conclusive may be said to be three. The alleged acceptance (1) may be a refusal and counter-offer, or a mere statement of fact relating to the proposed transaction; (2) may be an acceptance with some addition or variation of terms; (3) may be an acceptance of a general character, to be limited and defined by subsequent arrangement of terms.

3 Beav 334
Refusal
and
counter-
offer

(1) In the case of *Hyde v. Wrench*, *A* offered to sell a farm to *X* for £1,000. *X* said he would give £950. *A* refused, and *X* then said he would give £1,000, and, when *A* declined to adhere to his original offer, tried to obtain specific performance of the alleged contract. The Court, however, held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal followed by a counter-offer.

Stevenson v.
McLean,
5 Q B D 346

An offer once refused is dead and cannot be accepted unless renewed; but an inquiry as to whether the offeror will modify his terms does not necessarily amount to a refusal.

[1893] A C
552

The case of *Harvey v. Facey*, decided by the Judicial Committee, was not one of counter-offer, but of a statement as to price which the intending acceptor chose to

treat as an offer. *X* telegraphed to *A*, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid.' *A* replied by telegram, 'Lowest price for Bumper Hall Pen £900.' *X* telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you.'

Statement
of fact in
answer to
offer

The Committee pointed out that the first telegram of *X* asked two questions, (a) as to the willingness of *A* to sell, and (b) the lowest price, and that the word 'Telegraph' was addressed to the second question only. It was held that no contract had been made, that *A* in stating the lowest price for the property was not making an offer but supplying information, that the third telegram set out above was an offer by *X*—not the less so because he called it an acceptance—and that this offer had never been accepted by *A*.

We may perhaps doubt whether the Judicial Committee did not put a somewhat narrow construction on the telegrams of the parties, but the principle of the case is clearly sound, namely, that a man cannot accept an offer which has never been made. So, too, it has been held that a man is not bound by an offer wrongly transmitted by a telegraph clerk and accepted in the altered form by the offeree. The Post Office had no authority to convey the message except in the form presented to it.

Henkel v.
Pape,
L R 6 Ex. 7

(2) The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer and makes a counter-offer of his own.

In the case of *Jones v. Daniel*, *A* offered £1,450 for a property belonging to *X*. In accepting the offer *X* enclosed with the letter of acceptance a contract for signature by *A*. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer. The Court held that there was no contract; that it would be equally unfair to *A* to hold him to the terms of acceptance, and to *X* to hold him to the terms of the offer.

[1894] 2 Ch
332
New terms
put into
accept-
ance

16 Q.B.D.
727

The case of *Canning v. Farquhar* is decided substantially, though not so obviously, on the same ground. A proposal for life insurance was made by Canning to the defendant company, and was accepted at a premium fixed in their answer, subject to a proviso that 'no assurance can take place until the first premium is paid'. Before the premium was paid and the policy prepared Canning suffered a serious injury, and the company consequently refused to accept a tender of the premium and to issue the policy.

It was held that the company's acceptance of the proposal was really a counter-offer, and that the change in the risk which occurred between the counter-offer and the acceptance made by tender of the premium entitled the company to refuse to issue the policy.

Reference
to existing
terms—
good

(3) In cases where offer or acceptance is couched in general terms, but reference is made to a contract in which the intentions of the parties may be more precisely stated, it is important to ask whether the terms of such a contract were in existence, and known to the parties, or whether they were merely in contemplation. In the former case the offer and acceptance are made subject to, and inclusive of, the fuller conditions and terms; in the latter case the acceptance is too general to constitute a contract.

Rossiter v
Miller,
3 App. Ca.
1124

An oral offer was made to purchase land, the offeror was told that the land must be purchased under certain printed conditions, and the offer, which was still continued, was accepted 'subject to the conditions and particulars printed on the plan'. As these were contemplated in the offer a completed contract was thus constituted.

Filby v.
Hounsell,
[1896] 2 Ch.
737

An offer was made to buy land, and 'if offer accepted, to pay deposit and sign contract on the auction particulars'; this was accepted, 'subject to contract as agreed'. The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.

Reference
to future
terms—
bad

On the other hand, where an agreement for a lease was made 'subject to the preparation and approval of a formal contract', it was held that there was no contract.

'It comes therefore to this, that where you have a proposal or agreement made in writing expressed to be subject to a contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail.'

Winn v. Bull,
7 Ch D. 29,
32. *per*
Jessel, M.R.

There are cases which at first sight may appear to be cases of doubt or difference in the acceptance of an offer, but really turn out to involve only questions of the admissibility of evidence or the interpretation of terms.

Questions
of evi-
dence,

Such a case may occur when the parties have made a written agreement, depending for its coming into effect on an oral condition or stipulation. *Pym v. Campbell* is an instance of a contract, apparently complete, held in abeyance until an oral condition is fulfilled; and this oral condition is admitted in evidence as forming part of the written contract.

6 F & B. 370

Post, p. 293

Such, too, are cases in which a contract has to be made out of a correspondence involving lengthy negotiations. The parties discuss terms, approach and recede from an agreement; offers are made and met by the suggestion of fresh terms; finally there is a difference; and one of the parties asserts that a contract has been made, and the other that matters have never gone beyond a discussion of terms.

or of inter-
pretation,

Where such a correspondence appears to result, at any moment of its course, in a definite offer and acceptance, it is necessary to ask whether this offer and acceptance amounts to a completed agreement, for it is possible that there may be other terms under discussion which have not been settled between the parties. Where, however, the correspondence shows that the parties have definitely come to terms, a subsequent revival of negotiations cannot, except with the consent of both parties, affect the contract so made.

Hussey v. Horne Payne,
4 App. Ca.
311

Perry v. Suffields,
[1916] 2 Ch.
187, 191

But these cases turn rather on the meaning to be given to the words of the parties, than on rules of law.

§ 8. *An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.*

The proposition is best understood by an illustration.

An offer may be made to all the world; but becomes a promise only when it is accepted by one

The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual accepts the offer by rendering the services with knowledge of the offer, but not before.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world. This view has never been seriously entertained in English law; the promise is regarded as being made, not to the many who *might* accept the offer, but to the person or persons by whom it *is* accepted.

The contract may assume a form not so simple. Where competitors are invited to enter for a race, subject to certain conditions, by a committee or other agency, each competitor who enters his name thereby offers, to such other persons as may also compete, an undertaking to abide by the conditions under which the race is run. The offer is made through an agent or a committee to uncertain persons who define themselves by entry under conditions which are binding on all. Such was the contract made in the case of '*The Satanita*', *Clarke v. Dunraven*: and such is the case of a lottery where each one of a number of persons unknown to one another places money in the hands of a stakeholder on the terms that the whole sum is to be paid to one of them on a given conclusion of an event uncertain at the time.

[1895] P 255.
[1897] A.C.
59.
Barclay v. Pearson,
[1893]
2 Ch. 354

Difficult-
ties

Such offers suggest more practical difficulties.

According to the nature of the act asked for by the offeror and the circumstances in which the offer is made,

an offer may be susceptible of acceptance either by only one person or by a number of persons. In the former case the offer is exhausted when once accepted; in the latter it remains open for acceptance by any number of persons. For instance, where there is an offer of a reward for information resulting in the finding of a particular dog, or for information as to the place and date of death of a particular person, the offeror clearly does not intend to pay many times over for the same thing. So where the information asked reaches him from several sources, it has been held that he who gave the earliest information is entitled to the reward.

Lancaster
v. Walsh,
4 M. & W. 16

On the other hand in the 'Smoke Ball' case we find an instance of an offer capable of acceptance by a number of persons, such acceptance being signified by performance of its terms. The Carbolic Smoke Ball Company offered by advertisement to pay £100 to any one 'who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions'. It was added that £1,000 was deposited with the Alliance Bank 'showing our sincerity in the matter'.

Carlill v.
Carbolic
Smoke Ball
Co.
[1893]
1 Q B 256

Mrs. Carlill used the Smoke Ball as required by the directions; she afterwards suffered from influenza and sued the Company for the promised reward. The Company was held liable. It was urged that a notification of acceptance should have been made to the Company. The Court held that this was one of the class of cases in which, as in the case of reward offered for information or for the recovery of lost property, there need be no acceptance of the offer other than the performance of the condition. It was further argued that the alleged offer was an advertisement or puff which no reasonable person would take to be serious. But the statement that £1,000 had been deposited to meet demands was regarded as evidence that the offer was intended to be sincere.

CHAPTER III

Form and Consideration

Classification of Contracts

Contracts
are
Specialty,
or Simple

ENGLISH law recognizes only two kinds of contract, the contract made by a Deed, that is to say, under Seal, which is called a Covenant or a Specialty, and the Simple Contract. The Contract under Seal depends for its validity on its Form alone; Simple Contracts depend on the presence of Consideration, and as a rule they need be made in no special form. But on *some* Simple Contracts the law imposes, in addition to the requirement of Consideration, the necessity of some kind of Form, either as a condition of their existence or as a requisite of proof, and these Contracts stand in a sense in an intermediate position between the Contract under Seal and the ordinary Simple Contract which is free from the imposition of any special form. In addition to these a certain class of Obligation has been imported into the law of Contract under the title of Contracts of Record, and though these obligations are wanting in the principal features of Contract, it is necessary, in deference to established authority, to mention them here.

It will be best to deal first with the essentially formal contracts, then with those forms which are superimposed upon certain simple contracts, and then with Consideration, the requisite common to all simple contracts.

§ 1. *Contracts of Record*

Contracts
of Record

The obligations which are styled Contracts of Record are Judgment and Recognizance. But there is little of the true nature of a contract in the so-called Contracts of Record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon

their promulgation by a court of law. *Recognizances*¹ are promises made to the Crown, with whom, by the technical rules of English law, the subject cannot contract. We need consider these obligations no further.

§ 2. *Contracts under Seal*

The Contract under Seal derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but solely from the *form* in which it is expressed. Let us consider (1) how the contract under seal is made; and (2) in what circumstances it is necessary to employ it.

(1) *How a Deed or Specialty is made*

A deed must be in writing or printed, on paper or parchment. It is often said to be executed, or made conclusive as between the parties, by being 'signed, sealed, and delivered'. Formerly there was some doubt as to the necessity of a signature, but now by the Law of Property Act, 1925, s. 73, a person executing a deed must either sign or make his mark, and sealing alone is not sufficient. Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing. In the execution of a deed in modern times seals are commonly affixed beforehand; in fact they are often very much of a legal fiction, being no longer wax impressions of a man's crest or coat of arms, but merely adhesive wafers attached by the law stationer to the document.² The party executing the deed signs his

Contract
under
Seal

Sheppard
Touchstone,
53

Xenos v
Wickham,
L R 2 H L
296

Macedo v.
Stroud,
[1922] 2 A C
330

¹ Recognizances are aptly described as 'contracts entered into with the Crown in its judicial capacity'. A recognizance is a writing acknowledged by the party to it before a judge or officer having authority for that purpose, and enrolled in a Court of Record. It usually takes the form of a promise, with penalties for the breach of it, to keep the peace, to be of good behaviour, or to appear at the assizes.

² See the criticism of contracts under seal contained in Goddard, L. J.'s memorandum in the Sixth Interim Report of the Law Revision Committee, p. 35. [Cmd. 5449.]

name, places his finger on the seal intended for him, and utters (or is supposed to utter) the words 'I deliver this as my act and deed'. Thus he identifies himself with the seal and indicates his intention to *deliver*, that is, to give operation to the deed.

Escrow

A deed may be delivered subject to a condition; it then does not take effect until the condition is performed: during this period it is termed an *escrow*, but immediately upon the fulfilment of the condition it becomes operative and acquires the character of a deed. There is an old rule that a deed, thus conditionally delivered, must not be delivered to one who is a party to it, else it takes effect at once, on the ground that a delivery in fact outweighs oral conditions. But the modern cases appear to show that the intention of the parties prevails if they clearly meant the deed to be delivered conditionally.

Sheppard
Touchstone,
58

London
Freehold
Co. v Lord
Suffield,
[1897] 2 Ch.
at p 621

Indenture
and deed
poll

The distinction between a *Deed Poll* and an *Indenture* is no longer important since the Law of Real Property Amendment Act, 1845, s. 5. Formerly a deed made by one party had a polled or smooth-cut edge; a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called Indentures. An indented edge is not now necessary to give the effect of an Indenture to a deed purporting to be such.

(2) *When it is essential to employ the Contract under Seal*

Statute:
Law of
Property
Act, 1925,
ss. 52, 54

Statute sometimes makes it necessary for the validity of a contract to employ the form of a deed; e.g. a lease of lands, tenements, or hereditaments for more than three years, must be made under seal.

at Com-
mon Law,

Common Law requires in two cases that a contract should be made under seal.

gratuitous
promises,

(a) A gratuitous promise, or contract in which there is no consideration for the promise made on one side and accepted on the other, is void unless made under seal.

(b) A corporation aggregate can only be bound by contracts under the corporate seal.

But to the second of these rules the exceptions are now very numerous. Matters of trifling importance, or daily necessary occurrence, do not require the form of a deed. The supply of coals to a workhouse, the hire of an inferior servant, furnish instances of such matters. And where a municipal corporation owned a graving dock in constant use, it was held that agreements for the admission of ships might be made by simple contract.

contracts
with cor-
porations
Excep-
tions

Nicholson v.
Bradfield
Union, L.R.
1 Q.B. 620.
Wells v.
Mayor of
Kingston-on-
Hull, L.R.
10 C.P. 402

Trading corporations may through their agents enter into simple contracts relating to the objects for which they were created. 'A company can only carry on business by agents—managers and others; and if the contracts made by these persons are contracts which relate to the objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal.'

South of
Ireland
Colliery Co.
v. Waddle,
L.R. 3 C.P.
at p. 469

The Companies Act, 1929, s. 29 (re-enacting a similar provision in earlier Acts) enables a company incorporated under the Companies Acts to enter, through its agents,¹ into contracts in writing or by parol, in cases where such contracts could be entered into by private persons in like manner; and the Legislature has also in some other cases freed corporations from the necessity of contracting under seal and provided different forms in which their common assent may be expressed. Indeed, at the present time, especially since companies incorporated under the Companies Act far exceed in number corporations of other kinds, the cases which are covered by the exceptions to the rule which requires a corporation to contract under seal are far more numerous than those to which the rule itself still applies.

¹ The Law of Property Act, 1925, p. 74 (2), authorizes the directors or other governing body of a corporation, by resolution or otherwise, to appoint an agent to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.

Effects of
perform-
ance by
one party
Clarke v.
Cuckfield
Union, 21
L.J.Q.B. 349

[1903] 1 K.B.
772

There was for some time a conflict of judicial decision as to the liability of a corporation in cases where no contract has been made under seal but where goods have been supplied, or work done for the purpose for which the corporation exists. The point was finally settled in *Lawford v. Billericay R.D.C.*

A committee of a Rural District Council employed an engineer, already engaged by the Council for certain purposes, to do a number of acts in reference to work for which he had not been engaged. The Committee had no power to bind the Council by entering into contracts, but their minutes were approved, and their acts thereby affirmed and adopted by the Council. The Court held that the work done was work for the doing of which the Council was created, and that having taken the benefit of the work they could not refuse to pay for it. It should be noted that breach of an executory contract of employment made with an engineer, not under seal, would have given no right of action to the engineer or to the Council. We shall see later that the liability of the Council in this case was not a liability under the contract, but one imposed by law. It was a 'quasi-contractual' liability.

Infra, p. 440

Fish-
mongers'
Company v.
Robertson,
5 M. & Gr.
192

It appears that where a corporation has done all that it was bound to do under a simple contract it may in like manner sue the other party for a non-performance of his part.

We have stated the cases in which it is essential to contract under seal. But it must be understood that, either to give particular solemnity to a contract, or to secure certain advantages which are the peculiar attributes of a seal,¹ contracts are frequently made under seal in circumstances in which there is no legal obligation to employ that form.

§ 3. *Simple Contracts required to be in writing*

Simple
contracts

We have now dealt with the contract which is valid by

¹ For instances, *v. infra*, pp. 384, 387

reason of its Form alone, and we pass to the contract which depends for its validity upon the presence of Consideration.

All require
considera-
tion

These Simple Contracts are also often called *parol* contracts, because, with certain exceptions to be mentioned immediately, they can be entered into by word of mouth. In these exceptional cases, however, the law requires writing, sometimes as a condition of the validity of the contract itself, but sometimes only as evidence without which it cannot be enforced. But the fact that consideration is as necessary in these contracts as in those in which no writing is required must always be borne in mind: 'if contracts be merely written and not specialties, they are parol and consideration must be proved.'

Some
must also
be ex-
pressed in
writing

Rann v.
Hughes,
7 T.R. 350
(n)

The principal statutory requirements of form in simple contracts are briefly as follows:

1. A bill of exchange needed to be in writing by the custom of merchants, adopted into the Common Law. A promissory note was subjected to a like requirement by 3 & 4 Anne, c. 8. The requirement now depends on the Bills of Exchange Act, 1882, which further provides that the acceptance of a bill of exchange must also be in writing.

Negotiable
Instru-
ments

2. A contract for the repayment of money lent by a money-lender is not enforceable unless a note in writing containing all the terms of the contract has been signed by the borrower.

Money-
lenders Act,
1927, s. 6

3. Contracts of Marine Insurance must be made in the form of a policy.

Marine
Insurance
Act, 1906,
s. 22

4. An acknowledgment of a debt barred by the Statutes of Limitation must be in writing signed by the debtor, or by his agent duly authorized.

Limitation
Act, 1939,
s. 24

5. Certain special contracts are required to be in writing by particular Statutes: e.g. special contracts with Railway Companies for the carriage of goods, under the Railway and Canal Traffic Act, 1854, s. 7.

6. The Statute of Frauds, 1677, s. 4, requires written evidence in the case of certain contracts.

Statute of
Frauds

7. The Sale of Goods Act, 1893, s. 4, requires, in the

Sale of
Goods Act

absence of certain specified conditions, written evidence in the case of contracts for the sale of goods of the value of £10 or upwards.

The requirements of the Statute of Frauds and of the Sale of Goods Act are those which need special treatment, and with these we may now deal.¹

Statute
of Frauds

S. 4. 'No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; [or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;] or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.'

The words in brackets have been repealed, and s. 40 (1) of the Law of Property Act, 1925, has now substituted the words 'any contract for the sale or other disposition of land or any interest in land'. 'Disposition' in this provision is a word of wide meaning, for s. 205 (ii) of the Act states that it includes 'a conveyance and also a devise, bequest, or an appointment of property contained in a will'.

We have to consider three matters.

(1) The nature of the contracts specified.

¹ At the time when the Statute of Frauds (s. 17 of which is, in substance, re-enacted by s. 4 of the Sale of Goods Act, 1893) was passed, the rules of evidence excluded the testimony of the parties themselves, and it was to prevent the frauds arising from this rule that the requirement of writing was imposed. Under modern rules of evidence the requirement may therefore be criticized as an anachronism. On this ground, on the ground that the classes of contracts required to be in writing are arbitrarily selected and exhibit no relevant common quality, and on the ground that the requirement tends to promote more frauds than it prevents, the Law Revision Committee has recommended the repeal of so much as remains of s. 4 of the Statute of Frauds, of s. 4 of the Sale of Goods Act, 1893, and of s. 3 of the Mercantile Law Amendment Act, 1856 (*infra*, p. 75). Some members of the Committee, however, thought that writing should remain necessary for contracts of guarantee [Cmd. 5449; Sixth Interim Report of the Committee.]

(2) The form required.

(3) The effect upon such contracts of a failure to comply with the provisions of the Statute.

(1) We shall first note the characteristics of the five contracts specified.

Special promise by an executor or administrator to answer damages out of his own estate.

Nature of
executor's
liability

The liabilities of an executor or administrator in respect of the estate of a deceased person are of two kinds. At Common Law he may sue and be sued upon obligations devolving upon him as representative of the deceased. In Equity he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket; his liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, to avoid a forced sale, or for any other reason, he choose to promise to answer damages out of his own estate, that promise must be in writing together with the consideration for it, such as a forbearance by the creditor of the estate to sue, and must be signed by him or his agent. In this, as in all other contracts under the section, the presence of writing will not atone for the absence of consideration.

Rann v.
Hughes,
7 T R 350
(n)

Any promise to answer for the debt, default, or miscarriage of another person.

This is a promise of guarantee or suretyship. It is always reducible to this form: 'Deal with X, and if he does not pay you, I will.'

(a) This promise must be distinguished from a contract of indemnity, or promise to save another harmless from the result of a transaction into which he enters at the instance of the promisor. The distinction is of great practical importance, because a contract of indemnity, unlike

Guarantee
differs
from
indemnity

that of guarantee, does not require to be evidenced by writing of any sort.

In a contract of guarantee there must always be three parties in contemplation ; a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who in consideration of some act or promise, on the part of the creditor, promises to discharge the debtor's liability, *if the debtor should fail to do so*.

[1894]
2 Q.B. 885

The case of *Guild v. Conrad* affords an illustration both of a guarantee and of an indemnity. The plaintiff at the request of the defendant accepted bills of exchange drawn by a firm of Demerara merchants, receiving a promise from the defendant that he would, if necessary, meet the bills at maturity. Later the firm got into difficulties and the defendant promised the plaintiff that if he would accept a further batch of bills the funds should in any event be provided. The first promise was a guarantee, the second an indemnity.

'In my opinion,' said Davey, L. J., 'there is a clear distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not.'

Necessi-
tates pri-
mary li-
ability of
third
party,
Harburg
India Rub-
ber Comb
Co. v.
Martin,
[1902]
1 K.B. 778
Per curiam
in *Birkmyr*
v. Darnell,
1 Salk. 27

In a contract of guarantee there must, in fact, be an expectation that another person will pay the debt for which the promisor makes himself liable. If the promisor makes himself primarily liable the promise is not within the Statute, and need not be in writing.

'If two come to a shop and one buys, and the other, to gain him credit, promises the seller "*If he does not pay you, I will*", this is a collateral undertaking and void¹ without writing by the Statute of Frauds. But if he says, "*Let him have the goods, I will be your paymaster*," or "*I will see you paid*", this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant.'

Reader v.
Kingham, 13
C.B., N.S.
344

X, the bailiff of a County Court, was about to arrest a debtor; A promised to pay the debt if X would forbear

¹ The word 'void' is used where 'unenforceable' is meant.

to arrest the debtor. This was held to be a promise of indemnity from *A* to *X*, since the debtor was under no liability to *X*, and *X* was not authorized by the creditor to make this arrangement.

But it should be noted that a promise to answer for the debt of another, where the guarantee is merely incidental to a larger contract and not the sole object of the parties to the transaction, has been held not to be within the section. So in *Sutton v. Grey*, where *A* entered into an oral arrangement with a stock-broker to introduce business to him on the terms that *A* was to receive half the commissions earned and to pay half the losses incurred in the event of a client introduced by him failing to pay, it was held that his promise to answer for the debt of such a client did not fall within the section.

[1894] 1 Q.B. 285

Davys v. Buswell, [1913] 2 K.B. 47, and *infra*, p. 406

(b) The liability may be prospective at the time the promise is made, as, for example, a promise by *A* to *X* that if *M* employs *X*, he (*A*) will go surety for payment for the services rendered; yet there must be a principal debtor at some time: else there is no suretyship, and the promise, though not in writing, will nevertheless be actionable. Thus if *X* says to *A*, 'If I am to do this work for *M* I must be assured of payment by some one', and *A* says 'do it; I will see you paid', there is no suretyship, unless *M* should incur liability by giving an order: if he gives no order and the work is nevertheless done by *X*, *A* would be liable, not as surety, but as principal debtor, by reason of his oral promise.

and a real liability

Mount-stephens v. Lakeman, L.R. 7 H.L. 17, and see L.R. 7 Q.B. 202

(c) If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertake to be answerable for it, still there is no guarantee if the terms of the arrangement are such as to effect an extinguishment of the original liability. If *A* says to *X*, 'Give *M* a receipt in full for his debt to you, and I will pay the amount', this promise would not fall within the Statute; for there is no suretyship, but a substitution of one debtor for another. The liability of the third party must be a continuing liability.

Goodman v. Chase, 1 B. & Ald. 297

and continuous

May arise
from
wrong

2 B. & Ald.
613

(d) The debt, default, or miscarriage spoken of in the Statute will include liabilities arising out of wrong as well as out of contract. So in *Kirkham v. Marter*, *M* wrongfully rode the horse of *X* without his leave, and killed it. *A* promised to pay *X* a certain sum in consideration of his forbearing to sue *M*, and this was held a promise to answer for the 'miscarriage' of another within the meaning of the Statute.

Re Hoyle,
[1893] 1 Ch.
at p. 97

(e) It has been necessary in the case of this contract to point out that the words of the Statute only apply to promises on which an action *at law* can be brought. It might be possible so to frame a guarantee, as between partners, that it could only be enforced by equitable remedies, and in such a case it does not fall within the Statute.

Considera-
tion need
not be ex-
pressed

Infra, p. 75

(f) This contract is an exception to the general rule that 'the agreement or some memorandum or note thereof', which the Statute requires to be in writing, must contain the consideration as well as the promise: Mercantile Law Amendment Act, 1856.

Agreement made in consideration of Marriage.

Not a pro-
mise to
marry

The agreement here meant is not the promise to marry (the consideration for this is the promise of the other party), but the promise to make a payment of money or a settlement of property in consideration of, or conditional upon, a marriage actually taking place.

Law of Pro-
perty Act,
1925, s. 40 (1)

Contract for the sale or other disposition of land or any interest in land.

What is
an interest
in land

It is conceived that the decisions on the old wording contained in the Statute of Frauds are still applicable to this contract. The section deals with agreements made in view of leases or sales, but it is not always easy to say what constitutes an interest in land. Contracts which are preliminary to the acquisition of an interest, or such as deal with a remote and inappreciable interest, are outside

Angell v.
Duke, 1 R.
10 Q.B. 174

the section. Such would be an agreement with a boarding-house keeper for board and lodging; to pay for an investigation of title; to put a house into repair for a prospective tenant; or to transfer shares in a railway or a mining company which, though it possesses land, gives no appreciable interest in the land to its shareholders.

Wright v.
Stavert,
2 El. & El.
721
Boston v.
Boston,
[1904]
1 K.B. 124

The difficulties which have arisen in interpreting this section may be illustrated by reference to contracts for the sale of crops.

A distinction has been drawn as to these between 'emblemments', or *fructus industriales*, that is to say, crops produced by cultivation, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*. The law is now settled thus. If the property is to pass *after* the crops are severed from the soil then both *fructus naturales* and *fructus industriales* are goods within the meaning of the 4th section of the Sale of Goods Act, 1893. If the property is to pass *before* severance *fructus industriales* are goods, but *fructus naturales* are an interest in land.

*Fructus
indus-
triales et
naturales*

Agreement not to be performed within the space of one year from the making thereof.

Two distinctions should be noted with regard to this form of agreement.

(a) If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the Statute does not apply. A contract to pay a weekly sum for the maintenance of a child, or of a wife separated from her husband, has been held on this ground to be outside the section.

McGregor v.
McGregor.
21 Q.B.D.
429

This is what is meant by the *dictum* that to bring a contract within the operation of the Statute it must 'appear by the whole tenor of the agreement that it is to be performed after the year'. If the contract is for a definite period, extending beyond the year, then, though it might be concluded by notice within the year, on either side, the Statute operates.

Hanau v.
Ehrlich,
[1912] A.C.
39

Donellan v.
Read, 3 B.
& A. 899

(b) If all that one of the parties undertakes to do is intended to be done, and is done, within the year, the Statute does not apply. *A* was tenant to *X*, under a lease for twenty years. He promised orally to pay an additional £5 a year for the remainder of the term in consideration that *X* laid out £50 in alterations. *X* did this and *A* was held liable on his promise.

Reeve v.
Jennings,
[1910] 2 K.B.
522

But if the undertaking of one of the parties cannot be performed, while that of the other might be, but is not intended to be, performed within the year, the contract falls under the section.

Scott v.
Pattison,
[1923] 2 K.B.
723

It has been held that when services have been rendered under a contract which is unenforceable by virtue of the section a claim for reasonable remuneration for the services can be brought, not indeed on the contract expressed to be made between the parties, for the Statute makes that impossible, but on a different contract which the rendering of the services on the one side, and their acceptance on the other, is regarded as implying. Such a claim is a *quantum meruit* claim, the nature of which will be more fully explained in a later chapter. But the decision is not free from difficulty, for, if correct, it seems to offer an easy way of evading the Statute.

Infra p. 439
et seq.

Require-
ments of
form

(2) The form required is the next point to be considered. What is meant by the requirement that 'the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized'?

We may lay down the following rules.¹

The form
is merely
eviden-
tiary

(a) The form required does not go to the *existence* of the contract. The contract exists though it may not be clothed with the necessary form, and the effect of a failure to comply with the provisions of the Statute is

¹ With the exception of rule (d), what is said under this head may be taken to apply to the 4th section of the Sale of Goods Act, as well as to the 4th section of the Statute of Frauds.

simply that no action can be brought until the omission is made good.

It is not difficult to illustrate this proposition. Thus, the note in writing may be made so as to satisfy the Statute, at any time between the formation of the contract and the commencement of an action: or the signature of the party charged may be affixed even before the contract is made.

For instance, one party to the contract may sign a rough draft of its terms, and acknowledge his signature by way of concluding the contract when the draft has been corrected.

And an offer containing the names of the parties and the terms of an offer signed by the offeror will bind him even though the contract is only concluded by a subsequent parol acceptance. It may even happen that one of the parties to a contract which he has not signed may acknowledge it in a letter which supplies his signature and contains at the same time an announcement of his intention to repudiate the contract. He has then supplied the statutory evidence, and, as the contract had already been made, his repudiation is nugatory.

In fact the memorandum need not even be a document made as a record of the contract, but may have been intended for some entirely different purpose. It seems, however, to be settled that the writing relied on as taking a case out of the Statute must be in existence before the action is brought.

(b) The parties and the subject-matter of the contract must appear in the memorandum.

The parties must be named, or so described as to be identified with ease and certainty. A letter beginning 'Sir', signed by the party charged but not containing the name of the person to whom it is addressed, has been held insufficient to satisfy the Statute.

But, if the letter can be shown to have been contained in an envelope on which the name appears, the two papers

Illustrations

Stewart v. Eddowes, L.R. 9 C.P. 311

Koenigsblatt v. Sweet, [1923] 2 Ch. 314

Reuss v. Picklesley, L.R. 1 Exch. 342

Buxton v. Rust, L.R. 7 Exch. 1 & 279
Thirkell v. Cambi, [1919] 2 K.B. 590

Lucas v. Dixon, 22 Q.B.D. 357.

Farr Smith & Co. v. Messers, [1928] 1 K.B. 397

The parties and subject-matter must appear

Williams v. Jordan, 6 Ch.D. 517

Pearce v. Gardner, [1897] 1 Q.B. 688

will be regarded as one document, and the Statute is satisfied.

Stokes v.
Whicher,
[1920]
1 Ch. 411

Where one of the parties is not named, but is described, parol evidence will be admitted for the purpose of identification if the description points to a specific person, but not otherwise.

Rossiter v.
Miller,
3 App. Ca.
1141.

Potter v
Duffield,
18 Eq. 4

If property is sold by an agent on behalf of the 'owner' or 'proprietor' it may be proved by parol that X was the owner or proprietor; but if the sale was made by the agent on behalf of the 'vendor', of his 'client', or his 'friend', there would be no such certainty of statement as would render parol evidence admissible.

The same principle is applied to descriptions of the subject-matter of a contract.

Plant v.
Bourne,
[1897] 2 Ch.

Where X agreed to sell and A to buy '24 acres of land freehold and all appurtenances thereto at Totmanslow in the parish of Draycott in the County of Stafford' parol evidence was admitted to identify the land. But a receipt for money paid by A to X 'on account of his share in the Tividale mine' was held to be too uncertain as to the respective rights and liabilities of the parties, to be identified by parol evidence.

Caddick v
Skidmore,
2 De G & J.
52

The terms
may be
collected
from
various
docu-
ments

Stokes v.
Whicher,
[1920] 1 Ch
411

but must
be con-
nected on
the face
of them;

4 C P D. 454

(c) The memorandum may consist of various letters and papers, but they must be connected and complete.

The Statute requires that the terms, and all the terms of the contract, should be in writing, but these terms need not appear in the same document; a memorandum may be proved from several papers or from a correspondence, but the connexion must appear from the papers themselves.

11 East, 142

Parol evidence is admissible to connect two documents where each obviously refers to another, and where the two when thus connected make a contract without further explanation. This is the principle laid down in *Long v. Millar*, and adopted in later cases. It is not inconsistent with the decision of the often-cited case of *Boydell v. Drummond*. There two forms of prospectus were issued by the plaintiff, inviting subscriptions to an illustrated edition

of Shakespeare. Subscribers might purchase the prints only, or the work in its entirety. The defendant entered his name in a book in the plaintiff's shop, entitled 'Shakespeare Subscribers, their signatures'; afterwards he refused to carry out his purchase; and it was held that the subscription book and the prospectus were not connected by documentary evidence, and that parol evidence was not admissible to connect them. But though the rule as to the admission of parol evidence has been undoubtedly relaxed since 1809, it seems that *Boydell v. Drummond* would not now be decided differently, for the evidence sought to be introduced went farther than the mere connexion of two documents and seems to have dealt with the nature and extent of the defendant's liability.

Again, where a contract falls within the Statute, all its terms must be in writing, and the offer of parol evidence of terms not appearing in the writing would at once show that the contract was something other than that which appeared in the written memorandum.

Greaves v. Ashlin,
3 Camp. 426

On the other hand if a contract does not fall within the Statute, the parties are free (1) to put the whole contract into writing, (2) to contract only by parol, or (3) to put some of the terms in writing and arrange others by parol. In the last case, although that which is written may not be varied by parol evidence, yet the terms arranged by parol may be proved by parol, and these will then supplement the writing, and together form the whole contract.

(d) The consideration must appear in writing as well as the terms of the promise sued upon. This rule has been settled since the year 1804. It is not wholly applicable to the sale of goods (see p. 83) and is subject to an exception, created for reasons of commercial convenience by the Mercantile Law Amendment Act, 1856, s. 3, in the case of the 'promise to answer for the debt, default, or mis-carriage of another': such a promise shall not be—

Considera-
tion must
appear in
writing
Wain v. Warlters,
5 East, 10

'deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made

by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.'

Signature
of party
or agent
Daniels v.
Trefusis,
[1914] 1 Ch.
788

(e) The memorandum must be signed *by the party to be charged or some other person thereunto by him lawfully authorized.*

The contract therefore need not be enforceable at the suit of both parties, and a party who has not signed it is able to enforce it against the party who has. The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.

These rules are established by a number of cases turning upon difficult questions of evidence and construction, and a further discussion of them would here be out of place.

Statute
does not
avoid
contract,

Maddison v.
Alderson
8 App. Cas.
per Lord
Blackburn
at p. 488
Laythoarp
v. Bryant,
2 Bing N.C.
735

12 C.B. 801
but con-
tract can-
not be
proved

(3) It remains to consider what is the position of parties who have entered into a contract specified in section 4, but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action against a party who has not signed a memorandum because it is incapable of proof. On the other hand, a party who has not signed a memorandum can enforce the contract against one who has.

In the case of *Leroux v. Bourn*, the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the essential validity of a contract is determined by the 'proper law of the contract', which in this case was the law of France. The mode of proof of the contract, however (as being a matter of procedure), is governed by the *lex fori*, the law of the place where the action is brought. If, therefore, the 4th section *avoided* contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where

it was made, and the law of France would have been applicable. If, on the other hand, the 4th section affected the mode of proof only, the contract, though not void, was incapable of proof in England, because the necessary evidence was wanting.

Leroux tried to show that the 4th section would have avoided his contract, if it had been an English contract. He would then have succeeded, for he could have proved, first, his contract, and then the French law which made it valid. But the Court held that the 4th section dealt only with matters of proof, and did not avoid the contract, but only made it incapable of proof, unless he could produce a memorandum of it. This he could not do, and so lost his suit.¹

Under the equitable doctrine of Part Performance the Courts will in certain cases allow a contract, even though of a kind which the Statute of Frauds requires to be proved by writing, to be proved by parol evidence, when one of the parties has done acts in performance of his obligations under it. The doctrine, however, is strictly limited, and the conditions of its application are stated in a passage of Fry on Specific Performance, 6th ed., p. 276, which has been judicially approved, as follows:

The doctrine of part performance

Chapronière v. Lambert, [1917] 2 Ch. at p. 361

'In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: first, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; secondly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; thirdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and fourthly, there must be proper parol evidence of the contract which is let in by the acts of part performance.'

Rawlinson v. Ames, [1925] 1 Ch. at p. 114

The first of these conditions means that the acts of performance which are relied upon to take a contract out

Williams v. Wheeler, 8 C B (N.S.) at p. 316
Gibson v. Holland, L.R. 1 C.P. at p. 8

¹ The correctness of this decision has been doubted by Willes, J., and it may be that in the circumstances the rule of procedure should have been waived in favour of the 'proper law' of the contract. See Cheshire, *Private International Law*, 2nd ed., p. 636.

Lester v.
Foxcroft,
[1701] Colles',
P C, 108

Rawlinson
v. Ames,
[1925] 1 Ch.
96

of the Statute must of themselves suggest the existence of a contract such as it is desired to prove. For example, in an old case when the plaintiff, in pursuance of an oral agreement for a lease, had entered on the land of the defendants' testator, pulled down an existing messuage and built new houses thereon, the House of Lords ordered the defendants to execute the lease. In a more modern case the parties entered into an oral contract for the lease of a flat, and the plaintiff, the lessor, proceeded to have certain alterations, which had been agreed upon, made in the flat. This of itself was not an act such as would have taken the case out of the Statute, since obviously the plaintiff might have desired to improve her own property whether she had agreed to let it or not. But in fact the alterations were made at the request of the defendant, who constantly inspected their progress and made suggestions about the work, and it was held by Romer, J., that in those circumstances the acts of the plaintiff, when construed in the light of the defendant's acts, inevitably suggested the conclusion that the defendant must have made a contract giving her some interest in the property. They were consequently acts of part performance sufficient to let in parol evidence of the agreement for a lease. The reason of this requirement is that the equitable doctrine does no more than allow an alternative to the memorandum required by the Statute; the memorandum is required by the Statute as *evidence* of the contract, and equity requires the acts relied upon as part performance to fulfil the same function.

8 App Cas
467

Conversely, acts of performance which do not of themselves involve any inference of the existence of a contract will not bring the doctrine into play. In the leading case of *Maddison v. Alderson*, where the whole doctrine was exhaustively discussed by the House of Lords, the appellant had served as Alderson's housekeeper for many years without wages, and alleged that she had done so in consideration of his oral promise to make a will leaving her

the Manor House Farm for life. Alderson died intestate, and, the appellant having possessed herself of the title-deeds, his heir-at-law brought an action to recover them. It was held by the House of Lords that since the appellant's continuance in Alderson's service was easily explicable without supposing any contract relating to Alderson's land, it was not an act which would take the alleged contract out of the Statute. For the same reason it is well settled that the payment of a sum of money, either as purchase-money, or as rent in advance, is not a sufficient act of part performance, for 'the payment of money is an equivocal act, not (in itself), until the connexion is established by parol testimony, indicative of a contract concerning land'. On the other hand, 'the fact that an ingenious mind might suggest some other and improbable explanation of the facts' is not enough to prevent acts from being 'necessarily referable to the contract'.

per Lord
Selborne,
ibid., at
p. 479

Broughton
v. Snook,
[1938] 1 Ch.
at p. 515

The second of the above conditions of the application of the doctrine requires that the plaintiff, by acting on the faith of the promises of the other party, must have changed his position for the worse, so as to render it unfair that the other should not be bound by the contract; there would otherwise be no 'equity' for the court to enforce in his favour. The exclusion of a money payment from admissible acts of part performance has also been explained on this ground, for the money can be recovered back by action if the contract is not performed.

Chapronière
v. Lambert,
[1917] 2 Ch.
350

The third condition arises from the history of the doctrine, which is wholly the creation of courts of equity; and although since the Judicature Acts it may be administered in any court, it still has the limitations which were impressed upon it by the nature of equitable jurisdiction over contracts before the amalgamation of the courts. Thus in *Britain v. Rossiter* an action was brought for wrongful dismissal, in breach of an oral contract of service not to be performed within a year. The contract had been performed in part, and the doctrine of Part Perfor-

11 Q.B.D.
123

at p. 48o

35 Ch.D.
681

Lavery v.
Pursell,
39 Ch D.
508, at p. 519

How to be
reconciled
with the
Statute of
Frauds

Maddison
v. Alderson,
per Lord
Selborne,
at p. 474

mance was invoked to dispense with the need of writing. The Court of Appeal held, however, that the doctrine did not apply, since courts of equity had exercised it only in cases concerning land, and had never entertained suits for specific performance of contracts of service. Lord Selborne also in *Maddison v. Alderson* concluded from an examination of the cases that acts of part performance have been almost, if not quite, universally relative to the possession, use, or tenure, of land. It may be, however, though the practical importance of the distinction is not very great, that the true limitation of the doctrine was expressed by Kay, J., in *McManus v. Cooke*, where he says, 'It is probably more accurate to say that the doctrine of part performance applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing.'

The Judicature Acts, therefore, have not extended the remedy, but only the jurisdiction through which the remedy may be obtained, and as the Chancery could not have given damages in lieu of specific performance before the Acts, so damages can still not be obtained where parol evidence is admitted under the doctrine.

The justification of the doctrine of part performance has been stated to be that 'courts of equity will not permit the Statute to be made an instrument of fraud', but this is 'not an adequate explanation, either of the precise grounds, or of the established limits' of the doctrine. Courts of equity are no more able than courts of law to overrule a statute because it may lead to results which are contrary to conscience. Moreover, it would follow from such an explanation that *any* act whereby one of the parties had changed his position on the faith of a parol contract would take the case out of the Statute, whether the act was in itself evidence of the existence of the contract alleged or not, for from a moral point of view the fraud is the same in either case; but this, as we have seen, is not the law.

Lord Selborne in *Maddison v. Alderson* suggested a more adequate explanation: at p. 475

‘In a suit founded on such part performance, the defendant is really “charged” upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. . . . It is not arbitrary or unreasonable to hold that when the Statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connexion of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the Statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.’

On the other hand, in the same case Lord Blackburn at p. 489 inclined to the view that the doctrine was an anomaly which could not be reconciled with the words of the Statute; but, he added, ‘if it was originally an error, it is now I think *communis error*, and so makes the law’.

SALE OF GOODS ACT, 1893, Section 4

(1) A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.¹

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery,

¹ This sub-section contains the substance of s. 17, now repealed, of the Statute of Frauds. The language is altered so as to leave no doubt that the effect of this section, both as to the form required and the effect of its absence, is identical with that of s. 4 of the Statute of Frauds.

or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.¹

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

We have here to consider, as in the case of the 4th section of the Statute of Frauds—

(1) The nature of the contract.

(2) The form required.

(3) The effect of non-compliance with these requirements.

Contract
of sale

(1) The Act deals with the sale of goods, and goods are defined therein as ‘chattels personal other than things in action and money’; but the words ‘contract of sale’ include two sorts of agreement—a ‘sale’ and an ‘agreement to sell’, and the 4th section deals with both. The essential difference appears in an earlier section of the Act:

s. 1 (3)

‘Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at some future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.’

includes
a sale,

and an
agreement
to sell

The contract for the sale of goods may therefore contemplate either an instantaneous, or a future or conditional, transfer of property in the goods; and the difference between a ‘sale’ and an ‘agreement to sell’ is thus the difference between a conveyance and a contract. When the conditions on which the property in the goods is to pass to the buyer are fulfilled, an agreement to sell becomes a sale, and the buyer thereupon has the remedies of an owner in respect of the goods themselves, besides an action *ex contractu* against the seller if the latter fails to carry out his bargain or parts with the goods to a third party: the goods stand at the buyer’s risk, and if they are destroyed

¹ This sub-section embodies the section, now repealed, of Lord Tenterden’s Act, 1829, which settled the doubt as to the operation of the 17th section of the Statute of Frauds upon an agreement to sell.

the loss falls on him and not on the seller. Subsequent sections of the Act supply us with tests for determining whether a contract is a 'sale' or an 'agreement to sell'.

ss. 17 & 18

Where skilled labour has been expended on the thing sold in pursuance of the contract, and before the property is transferred, there may sometimes be difficulty in determining whether the contract is a contract of sale or for the hire of services. A simple test would be to say that, whatever the respective values of the labour and the materials, if the parties contemplate the ultimate delivery of a chattel the contract is for the sale of goods, and this was believed to be the law until a recent decision of the Court of Appeal. It now appears that the answer turns upon the question whether the substance of the contract is the production of an article to be sold or the exercise of skill and labour; in the latter case the mere fact that, incidentally to the main purpose of the parties, some materials may be intended to pass from one to the other will not convert the contract into one of sale. Thus a contract to print and deliver a book and a contract to paint a portrait have been held to be contracts for work and labour.

Lee v
Griffin,
1 B & S. 272
Robinson
v. Graves,
[1935] 1 K.B.
579

Clay v
Yates,
1 H. & N 73

(2) As to the form, it is enough to say that where, in absence of a part acceptance and receipt or part payment, a note or memorandum in writing is required, the rules applicable to contracts under section 4 of the Statute of Frauds apply to contracts under the Sale of Goods Act with one exception.

Difference
as to form
from s. 4 of
Statute of
Frauds

The consideration for the sale need not, under this section, appear in writing unless the price has been fixed by the parties. It then becomes a part of the bargain and must appear in the memorandum. If the parties have not fixed a price, so that a promise to pay a reasonable price is implied by s. 8 (2) of the Act, the memorandum will be sufficient, though no price is mentioned in it.

Hoadley v.
McLaine,
10 Bing. 482

The definition of 'acceptance' in sub-section (3) should be noted. As the sub-section states it is not necessary that there should be 'an acceptance in performance of the con-

'Accept-
ance'

Infra, p. 330
In re A
 Debtor
 [1939] 1 Ch.
 225

tract' (which is defined in section 35 of the Act), though if there is such an acceptance it is enough to make the contract enforceable; but even if there is no acceptance within section 35, an oral contract will still be enforceable if there is an 'acceptance' as defined in section 4 by the words 'when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale'. An example will make this clear. A orally ordered hay of a certain quality over the value of £10. On its arrival he took a sample to test the quality, and, after examining it, said, 'The hay is not to my sample and I shall not have it.' It was held that his action 'recognized a pre-existing contract of sale'; that is, it was only to be explained on the hypothesis that a contract existed. He had therefore supplied the evidence necessary to prove the existence of the contract; though this would of course not preclude him from proving, if he could, that the hay was not up to sample.

Abbot & Co.
v. Wolsey,
 [1895]
 2 Q.B. 97

Prested v.
Gardner,
 [1910]
 2 K.B. 776;
 [1911]
 1 K.B. 425

It is to be observed that a contract for the sale of goods not to be performed within a year, though complying with s. 4 of the Sale of Goods Act, is not excepted from the operation of s. 4 of the Statute of Frauds. Acceptance or receipt of the goods in these circumstances does not therefore dispense with the note or memorandum in writing required by the earlier Statute.

Effect of
 non-com-
 pliance
 with
 section

(3) It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing, the section declares that the contract shall not be 'enforceable by action'.

Taylor v. Gt.
E. Railway,
 [1901] 1 K.B.
 774 at p. 779

Like the 4th section of the Statute of Frauds, the requirements of the Sale of Goods Act do not affect the validity of the contract, but only impose conditions as to its proof when it is sought to enforce it by action.

§ 4. Consideration

It has already been stated that Consideration is a universal requisite of contracts not under seal. It will be well

therefore to start with a definition of Consideration ; and we may take that which is given in the case of *Currie v. Misa* :

Consideration defined

‘A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.’

L.R.
10 Exch. 162

Consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise of the other party. It must necessarily be *in respect of the promise*, since it is consideration that gives to the promise a binding force.

A benefit conferred or a detriment suffered otherwise than in respect of, or in return for, the promise of the other party can, therefore, never constitute consideration, and this point received a rather curious illustration in the case of *Wigan v. English and Scottish Law Life Assurance Association*. One Hackblock had insured his life with the defendant company by a policy which was to be void ‘if the life assured died by his own hands’, but this condition was not to prejudice ‘the bona fide interests of third parties based on valuable consideration’. Hackblock, being pressed by Wigan for payment of a debt, executed a mortgage of the policy to Wigan, but left it with his own solicitors, who succeeded in getting further time for the payment of the debt without using or even mentioning the mortgage. They subsequently, at Hackblock’s request, destroyed the mortgage, and it was only brought to the knowledge of the plaintiffs, the executors of Wigan, after Hackblock had committed suicide. The plaintiffs then claimed the policy moneys from the insurance company. Parker, J., held that Wigan had not given consideration for the interest, if any, which he had acquired in the policy by virtue of the mortgage.

[1909] 1 Ch.
291

‘It appears to me to be reasonably clear that the mere existence of a debt¹ from A to B is not sufficient valuable consideration

¹ A statutory exception to this principle exists under § 27 of the Bills of Exchange Act, 1882. Valuable consideration for a bill may be constituted by: (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability.

for the giving of a security from *A* to *B* to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, [and] then I think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given.

'On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all.'

We may now lay down some general rules as to Consideration:

1. It is necessary to the validity of every promise not under seal.
2. It need not be adequate to the promise, but must be of some value in the eye of the law.
3. It must be legal.
4. It must be either present or future, it must not be past.

1. *Consideration is necessary to the validity of every simple contract.*

3 Burr 1663
Necessity
of con-
sideration

The case of *Pillans v. Van Mierop* shows that the rule laid down above was still open to question in the year 1765. Lord Mansfield held that consideration was only one of several modes for supplying evidence of the promisor's intention to bind himself; and that if the terms of a contract were reduced to writing by reason of commercial custom, or in obedience to statutory requirement, such evidence dispensed with the need of consideration.

The question arose again in 1778. In *Rann v. Hughes*, Mrs. Hughes, administratrix of an estate, promised in writing to pay out of her own pocket money which was due from the estate to the plaintiff. There was no consideration for the promise, and it was contended that the observance of the form required by section 4 of the Statute of Frauds made consideration unnecessary. The case went to the House of Lords. The opinion of the judges was taken, and was thus delivered by Skynner, C. B.:

7 T.R. 350
(a)

'It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such an agreement is "nudum pactum ex quo non oritur actio"; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. . . . All contracts are by the law of England divided into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved.'

We here get a rule of universal application, a uniform test of the actionability of every promise made by parol. In each case we must ask, Does the promisor get any benefit or the promisee sustain any detriment, present or future, in respect of the promise? If not, the promise is gratuitous, and is not binding. In working out this doctrine to its logical results it has, no doubt, happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule. Thus we find a learned Law Lord, trained under another system of jurisprudence, commenting as follows on a case before him in the House of Lords:

Exceptions to general rule

'I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make

Lord Dunedin in *Dunlop v. Selfridge*, [1915] A.C. 847, 855

it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.'

We may note two exceptions to the universality of the rule, of which the first is apparent rather than real.

See p. 111

(1) The promise of a gratuitous service is not enforceable as a promise, but the promisor who embarks upon the performance of such a promise comes under a liability to use ordinary care and skill.

See p. 181

(2) In certain dealings arising out of negotiable instruments, such as bills of exchange and promissory notes, a promise to pay money may be enforced though the promisor gets nothing and the promisee gives nothing in respect of the promise.

These two exceptions represent legal obligations recognized in the Courts before the doctrine of Consideration was clearly formulated; they were engrafted upon the Common Law, in the first case from the historical antecedents of contract, in the second from the law merchant. It is better to recognize these exceptions, to define them and to note their origin, than to apply the doctrine of Consideration by forced and artificial reasoning to legal relations which grew up outside it.

2. Consideration need not be adequate to the promise, but must be of some value in the eye of the law.

Adequacy
of con-
sideration

Courts of law will not make bargains for the parties to a suit, and, if a man gets what he has contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be a benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee: in any case 'its adequacy is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced.'

Per Black-
burn, J.,
Bolton v.
Madden,
L.R. 9 Q.B.
55

The following cases will illustrate the rule.

Bainbridge
v. Firm-
stone, 8 A.
& E. 743

Bainbridge owned two boilers, and at the request of Firmstone allowed him to weigh them on the terms that

they were restored in as good a condition as they were lent. Firmstone took the boilers to pieces in order to weigh them and returned them in this state, and for breach of his promise Bainbridge sued him. The defendant was held liable.

not re-
garded by
the Courts

'The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit: at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time.'

In *Haigh v. Brooks*, the consideration of a promise to pay certain bills was the surrender of a document supposed to be a guarantee, which turned out to be unenforceable. The worthlessness of the document surrendered was held to be no defence to an action on the promise. 'The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise.'

10 A. & E.
309

In *De la Bere v. Pearson*, Vaughan Williams, L. J., thus described the contract sued upon:

[1908]
1 K.B. 280
at p. 287

'The defendants advertised, offering to give advice with reference to investments. The plaintiff, accepting that offer, asked for advice, and asked for the name of a good stockbroker. The questions and answers were, if the defendants chose, to be inserted in their paper as published; such publication might obviously have a tendency to increase the sale of the defendant's paper. I think that this offer, when accepted, resulted in a contract for good consideration.'

Equity treats inadequacy of consideration as affording corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or get his promise cancelled. But mere inadequacy of consideration, unless, in the words of Lord Eldon, it is so gross as 'to shock the conscience and amount in itself to conclusive evidence of fraud', is not of itself a ground on which specific performance of a contract will be refused.

except in
granting
equitable
remedies

Coles v.
Trecothick,
9 Ves. 246
Post, p. 378

Though consideration need not be adequate it must be real. This leads us to ask what is meant by saying that

Reality of
considera-
tion

consideration must be 'something of some value in the eye of the law'.

L R. 10
Exch. 162

Forms of
considera-
tion

The definition of Consideration, supplied by the Court of Exchequer Chamber in *Currie v. Misa*, amounts to this—that consideration is something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee in respect of the promise. Therefore it may be (1) a present act, forbearance, or sufferance, constituting either the offer or the acceptance of one of the parties, and being all that can be required of him under the contract; or (2) a promise to do, forbear, or suffer, given in return for a like promise. In the first case the consideration is present or executed, in the second it is future or executory.

The acceptance of the offer of a reward by supplying the information required; the offer of goods, accepted by their use or consumption, are illustrations of executed consideration. Mutual promises to marry; a promise to do work in return for a promise of payment, are illustrations of executory considerations. And the fact that the promise given for a promise may be dependent upon a condition does not affect its validity as a consideration. *A* promises *X* to do a piece of work for which *X* promises to pay if the workmanship is approved by *M*. The promise of *X* is consideration for the promise of *A*.

Tests of
reality

In the application of this rule we must ask, when action is brought upon a promise:

- (a) Did the promisee do, forbear, suffer, or promise *anything* in respect of the promise to him?
- (b) Was his act, forbearance, sufferance, or promise of any ascertainable value?
- (c) Was it more than he was already legally bound to do, forbear, or suffer?

On the answer to these questions depends the *reality* of the consideration.

Ante, p. 86

(a) Apart from the opinions expressed by Lord Mansfield, we find cases later in date which once raised a doubt

whether consideration, under certain circumstances, is necessary to make a promise actionable.

The cases have resulted in the establishment of two rules:

Motive is not the same thing as consideration.

Consideration must move from the promisee.

Motive must be distinguished from consideration

In *Thomas v. Thomas*, a widow sued her husband's executor for breach of an agreement to allow her to occupy a house, which had been the property of her husband, on payment of a small portion of the ground-rent. The executor in making the agreement was carrying out a wish expressed by the deceased that his wife should have the use of the house. The Court held that the desire to carry out the wishes of the deceased would not amount to a consideration. 'Motive is not the same thing with consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff.' But it was further held that the undertaking by the plaintiff to pay ground-rent was a consideration for the defendant's promise, and that the agreement was binding.

2 Q.B. 851
Motive and consideration,

The confusion of motive and consideration has appeared in other ways.

The distinction between *good* and *valuable* consideration, or family affection as opposed to money value, is only to be found in the history of the law of Real Property. Motive has most often figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable, for our purpose, from a desire on the part of an executor to carry out the wishes of a deceased friend, or a desire on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.

good consideration,
Mortimore v. Wright, 6 M. & W. 482

past consideration

At the end of the eighteenth and beginning of the nineteenth century the moral obligation to make a return for past benefits had obtained currency in judicial language as an equivalent to consideration. The topic belongs to the discussion of past as distinguished from executed or present consideration, but it is well here to insist on the truth that past consideration is no consideration, and that what the promisor gets in such a case is the satisfaction of motives of pride or gratitude. The question was settled once for all in *Eastwood v. Kenyon*, and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation resting on the promisor.

11 A. & E.
438
Infra, p. 111

Consideration must move from the promisee

Consideration must be furnished by promisee

This means that a party who wishes to enforce a contract must be able to show that he himself has furnished consideration for the promise of the other party.

Infra, p. 254

This rule is to be distinguished from another with which it is sometimes confused. We shall see in a later chapter that, with certain exceptions or quasi-exceptions, a contract cannot confer any rights on one who is not a party to it, even though the very object of the contract may have been to benefit him. This inability of one who is not a party to a contract to acquire rights under it follows from the view which our law has adopted as to the operation of Contract generally; it has no particular connexion with the doctrine of Consideration. The rule which we are now examining, however, follows from the nature of Consideration, which, as we have seen, is something done, forborne, or suffered, or promised to be done, forborne, or suffered, by the promisee. It is not enough that consideration should have been given; it must have been given by the promisee. Thus if, for example, *A*, *B*, and *C* enter into a contract under which *A* promises both *B* and *C* that if *B* will do a piece of work that *A* desires to have done, he, *A*, will give £100 to *C*, *B* of course can compel *A* to pay the

money to *C*, but *C* cannot compel him to pay the money to himself because, though a party to the contract, he is 'a stranger to the consideration'.¹

(b) We now come to the class of cases in which the consideration turns out to be of no ascertainable value.

Impossibility, either physical or legal, which exists at the time of the formation of the contract and is obvious upon the face of it, makes the consideration unreal. The impossibility must be obvious, such as is, 'according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted'.

Prima facie impossibility

Clifford v. Watts, L.R. 5 C.P. 577, 588

Thus a promise to pay money in consideration of a promise to discover treasure by magic, to go round the world in a day, or to supply the promisor with a live pterodactyl, would be void for unreality in the consideration furnished.

Physical

And an old case furnishes us with an instance of a legal impossibility. A bailiff was promised £40 in consideration of a promise made by him that he would release a debt due to his master. The Court held that the bailiff could not sue; that the consideration furnished by him was 'illegal', for the servant cannot release a debt due to his master. By 'illegal' it is plain that the Court meant legally impossible.

or legal

Harvey v. Gibbons, 2 Lev. 161

We must distinguish, however, from such cases as these cases in which, though the impossibility exists at the time the contract is formed, it is not obvious on the face of it and only becomes apparent later, and also cases in which the performance of a promise, not originally impossible, becomes so by supervening events. In the first of these cases the contract may be void on the ground of mistake; in the second it may be discharged by subsequent impossibility.

Infra, pp. 146 and 338

¹ The Law Revision Committee, in recommending the abolition of this rule, pertinently remark: 'We can see no reason either of logic or of public policy why *A*, who has got what he wanted from *B* in exchange for his promise, should not be compelled by *C* to carry out that promise merely because *C*, a party to the contract, did not furnish the consideration.' (Cmd. 5449, p. 22.)

Uncertainty

Again, a promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced.

A son gave a promissory note to his father: the father's executors sued him upon the note, and he alleged that his father had promised to discharge him from liability in consideration of a promise on his part that he would cease from complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers. It was said that the son's promise was no more than a promise 'not to bore his father', and was too vague to form a consideration for the father's promise to waive his rights on the note.

White v.
Bluett, 23
L. J. Exch.
36

Taylor v.
Brewer, 1 M.
& S. 290.
Davies v.
Davies, 36
Ch.D. 359

So, too, promises to pay such remuneration 'as shall be deemed right'; to retire from the practice of a trade 'so far as the law allows', have been held to throw upon the Courts a responsibility of interpretation which they were not prepared to assume. But this matter has already been referred to in connexion with offers held to be incapable of creating legal relations.

Ante, p. 53

Cases occur in which it is hard to determine whether the consideration is or is not real. A good illustration of such cases is afforded by promises of forbearance to exercise a right of action or agreements to compromise a suit.

Forbearance to sue

A forbearance to sue, even for a short time, may be consideration for a promise, although there is no waiver or compromise of the right of action.

2 Dr. & Sm.
289

In the *Alliance Bank v. Broom* Messrs. Broom were asked to give security for moneys owing by them to the Bank. They promised to assign the documents of title to certain goods; they failed to do so and the Bank sued for specific performance of the promise. The Court held that—

'Although there was no promise on the part of the Bank to abstain for any certain time for suing for the debt, the effect was that the Bank did give and Messrs. Broom received the benefit of some degree of forbearance, not indeed for any definite time, but at all events some degree of forbearance.'

To use the expression adopted by the Court in a similar case, the promise to give security 'stayed the hand of the creditor'.

But in order that forbearance should be a consideration some liability must be shown to exist, or to be reasonably supposed to exist by the parties. In *Jones v. Ashburnham* ^{4 East, 455} action was brought on a promise to pay £20 to the plaintiff in consideration of his forbearance to sue for a debt which he alleged to be due to him from a third party deceased. The pleadings did not state that there were any representatives of the dead man towards whom this forbearance was exercised, nor that he had left any assets to satisfy the claim. It was a mere promise not to sue persons unknown for a sum which was not stated to be in existence or recoverable, and was held to be no consideration. 'How', said Lord Ellenborough, 'does the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of suit, when it does not appear that any person *in rerum natura* was liable to him?'

The compromise of a suit furnishes consideration of the same character. In the case of forbearance the offer may be put thus: 'I admit your claim but will do or promise something if you will stay your hand.' In the case of a compromise the offer is 'I do not admit your claim' (or 'defence' as the case may be), 'but I will do or promise something if you will abandon it'. Compromise of suit

But it has been argued that if the claim or defence is of an unsubstantial character the consideration fails. The answer is to be found in the judgment of Cockburn, C. J., ^{L.R. 5 Q.B. 449} in *Callisher v. Bischoffsheim*:

'Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes that he has a fair chance of succeeding he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the

other party gets an advantage, and instead of being annoyed with an action he escapes the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.'

Wade v.
Simeon,
2 C.B. 548

If therefore it is clear that one of the parties to the compromise has no case, and knows that he has none, the agreement to compromise would not be held binding.

(c) Does the promisee do, forbear, suffer, or promise more than that to which he is legally bound? If the promisor gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal.

Perform-
ance of
public
duty

Collins v.
Godefroy,
1 B. & A. 950

This may occur where the promisee is under a public duty to do that which he promises to do. Where a witness has received a subpoena to appear at a trial, a promise to pay him anything beyond his expenses, is based on no consideration; for the witness is bound to appear and give evidence.

England v.
Davidson,
11 A. & E.
856

But where a police-constable who sued for a reward offered for the supply of information, leading to a conviction, had rendered services outside the scope of his ordinary duties, he was held entitled to recover.

2 C.B. 548

On the same principle a promise not to do what a man legally cannot do is an unreal consideration. The case of *Wade v. Simeon*, cited in discussing forbearance as a consideration, is a sufficient illustration of this point.

Promise to
perform
existing
contract

Again, we find unreality of consideration where the promisee undertakes to fulfil the conditions of an existing contract with the promisor.

In the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided amongst them. The promise was held not to be binding.

Stilk v.
Myrick,
2 Camp. 317

'The agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had

undertaken to do all they could under all the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port.'

But the decision would have been otherwise if contemplated risks had arisen. There is an implied condition in the contract into which a seaman usually enters, that the ship should be seaworthy. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his agreement was held to be binding.

Hartley v.
Ponsonby,
7 E. & B. 872

Turner v.
Owen, 3 F.
& F. 176

It is not difficult to see that consideration is unreal if it consist in a promise given to perform a public duty, or to perform a contract already made with the promisor. It is harder to answer the question whether the performance or promise to perform an existing contract with a third party is a real consideration.

Promise to
perform
contract
with third
party

We must note two cases dealing with this form of consideration.

In *Shadwell v. Shadwell*, A had written to the plaintiff, his nephew, who was engaged to be married to X, as follows: 'I am glad to hear of your intended marriage with X; and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life or until your annual income derived from your profession as a Chancery barrister shall amount to six hundred guineas.' The plaintiff married X; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The Court differed as to the existence of a consideration for the uncle's promise. Erle, C. J., and Keating, J., inclined to regard it as the offer of a promise capable of becoming a binding contract when the marriage took place. Byles, J., dissented, holding that the plaintiff had done no more than he was legally bound to do, and that his marriage was therefore no consideration for the uncle's promise.

9 C.B., N.S.
159

6 H. & N.
295

In *Scotson v. Pegg*, Scotson promised to deliver to Pegg a cargo of coal then on board a ship belonging to Scotson, and Pegg promised in return to unload and discharge the coal at the rate of forty-nine tons a day during each working day after the ship was ready to discharge. This he failed to do, and when sued for breach of his promise, pleaded that Scotson was under contract to deliver the coals to X or to X's order, and that X had made an order in favour of Pegg, so that Scotson, in promising to deliver the coals to Pegg, had promised no more than he was bound to perform under his contract with X, and there was therefore no consideration for his promise to unload in the manner specified.

The Court held that Pegg was liable. 'It is consistent with the declaration,' said Martin, B., 'that there may have been some dispute as to the defendant's right to have the coals or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship.' But Wilde, B., said, 'If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding.'

Difficulties presented by
Shadwell v. Shadwell
and *Scotson v. Pegg*

Neither of these cases can be regarded as decisive of the point under discussion.

In *Shadwell v. Shadwell*, we may doubt whether there was in fact any contract at all, or anything but one of those promises which are not intended to create legal relations. As Byles, J., pointed out in his dissenting judgment, the words 'to assist you at starting' would more naturally refer to the nephew's start in his profession than to his marriage, the marriage itself being rather the occasion than the inducement of the promise. The case would have been different, if (to adopt a suggestion made by Martin, B., in the course of the argument in *Scotson v. Pegg*)

the nephew had had it in mind to break his engagement and the uncle to induce him to keep it had promised to pay him the annuity.

In *Scotson v. Pegg*, the facts of the case are not very clearly stated, but the Court apparently thought that the promise to deliver coals to the defendant might have been something more than the existing promise to a third party; that there might have been a right waived or claim forgone which did not appear in the pleadings.

There are nevertheless *dicta* in the two cases which seem to show that two judges in the first, and Baron Wilde in the second, thought that a promise given in consideration of the performance or promise to perform a contract with a third party was binding.

It may well be argued that there is a distinction between a promise by *B* to *A* to perform an obligation which already exists as between himself and *A*, and a promise by *B* to *A* to perform an obligation which he, *B*, owes to a third party; the two contracts are wholly distinct from one another, and indeed *A* may not even know that *B* is under an obligation to anyone to perform the act in question. Nor is the performance of a contractual obligation to a third party on the same footing as the performance of a public duty. On the other hand, it may be urged that we beg the question if we say that the consideration is the detriment to the promisee in exposing himself to two actions instead of one for the breach of contract, for it is only if the second contract is binding that two actions will lie. Again, if we say that the consideration is the fulfilment of the promisor's desire to see the contract carried out (assuming that he knows of its existence), we are in danger of confounding motive and consideration.

The decisions inconclusive

Yet, on the whole, it seems reasonable to say that the performance of, or the promise to perform, an outstanding contract with a third party may be good consideration for a promise, for, as Martin, B., pointed out in *Scotson v. Pegg*, the defendant is a stranger to the prior contract,

and 'we must deal with this case as if no prior contract had been entered into'. The point, however, awaits an authoritative determination.

Unreality
of con-
sideration
in dis-
charge of
contract
by per-
formance
Foakes v.
Beer, 9 App.
Cas. 605
Vanbergen
v. St.
Edmunds
Properties
Ltd., [1933]
2 K.B. 223
What
is done
must be
different:

The principle that a promise to perform an existing promise already made to the promisor is an unreal consideration has been applied to the discharge of a contract by performance, and has given rise to the rule that the payment by a debtor of a smaller sum in satisfaction of a larger is not a good discharge of a debt. Such payment is no more than a man is already bound to do, and is no consideration for a promise, express or implied, to forgo the residue of the debt. The thing done or given must be in some respect different from that which the recipient is entitled to demand, in order to support his promise. The fact that the difference is slight will not destroy its efficacy in constituting a consideration, for if the Courts inquired whether the thing done in return for a promise was sufficiently unlike that to which the promisor was already bound, they would inquire into the adequacy of the consideration. Thus,

Pinnel's
case, 5 Co.
Rep. 117

'the gift of a horse, a hawk or a robe, in satisfaction, is good. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.'

else no
considera-
tion for
the pro-
mise to
forgo

It is clear that a promise, not under seal, to forgo legal rights, must depend for its validity upon the rules common to all promises. But the general rule is subject to some variations of detail according as the promise is made *before* or *after* the contract is broken.

Contract
executory

(1) If a contract is wholly executory, and the liabilities of both parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.

Contract
executed

A contract in which *A*, one of the parties, has done his part, and *X*, the other, remains liable, cannot (save in the

exceptional case of bills of exchange or promissory notes) be discharged by mere consent, but it may be discharged by the substitution of a new agreement. *A* has supplied *X* with goods according to a contract. *X* owes *A* the price of the goods. If *A* waives his claim for the money, where is the consideration for his promise to waive it? If *A* and *X* substitute a new agreement, to the effect that *X* on paying half the price shall be exonerated from paying the remainder, where is the consideration for *A*'s promise to forgo the payment of half the sum due to him? The new agreement needs consideration: there must be some benefit to *A* or detriment to *X* in return for *A*'s promise. Detriment to *X* there can be none in paying half of a sum the whole of which he may at any time be compelled to pay; and benefit to *A* there can be none in receiving a portion of a sum the payment of which he can at any time compel. Unless *A* receives something different in kind, a chattel, or a fixed instead of an uncertain sum, his promise is gratuitous and must be made under seal. In *Goddard v. O'Brien* it was held that the giving of a negotiable instrument in satisfaction of a debt of a larger amount was the giving of something different in kind, and therefore that there was consideration for forgoing part of the debt. Doubt however has been thrown on the correctness of this decision, since it would appear that on the facts the cheque was accepted, not in substitution for the debt, but only conditionally upon its being honoured, so that the case really stood on the same footing as the payment of a less amount in discharge of a greater.

Foster v.
Dawber,
6 Ex. 839.
See pp. 305
et seq.

9 Q.B.D. 37

Hirachand
Punam-
chand v.
Temple,
[1911]
2 K.B. at
p. 340.
See *infra*,
p. 315

(2) We now come to cases where the contract is broken and a promise made to forgo the right arising from the breach.

Contract
broken:

Where the right itself is in dispute the suit may be compromised as already described.

right in
dispute

Where the right is undisputed, the amount due may be uncertain or certain.

right
admitted:
damages

If it is uncertain, the payment of a liquidated or certain

uncertain

Wilkinson v. Byers, 1 A. & E. 106 sum would be consideration for forgoing a claim for a larger though uncertain amount.

damages certain If it is certain, the promise to forgo the claim or any portion of it can only be supported by the giving of something different in kind, or by a payment in different manner to that agreed on.

Peytoe's case, 9 Rep. 77 Formerly the cause of action arising from the breach of contract was not discharged so long as the satisfaction remained executory, that is, so long as the new agreement had not been carried out. As is said in an old case,

Lynn v. Bruce, 2 H.Bl. 319 'accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent'. But the question is now regarded as one of the construction of the agreement; and the promise only, as distinct from the actual performance of it, may be a good satisfaction and discharge of the cause of action, if it clearly appears that the parties so intended.

The rule that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt has often been criticized, and certainly, when taken in conjunction with the rule that the law will not inquire into the adequacy of consideration, it may lead to absurd results. 'According to English Common Law', said Jessel, M. R., 'a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit, if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*.' On the other hand, the rule may be defended, as it was in a judgment in which the House of Lords affirmed the rule, on the ground that 'it is not really unreasonable, or practically inconvenient, that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation'.

It is difficult too to see any difference between a promise

Couldery v. Bartrum, 19 Ch. D. at p. 399

Foakes v. Beer, 9 App. Ca. 605

by *A* to *X* to give him £45 on demand, and a promise by *A* to *X* to excuse him £45 out of £50 then due, or why, if consideration is needed in the one case, it should not be needed in the other. It may reasonably be argued that the law should not favour a man who is excused money which he ought to pay, more than a man who is promised money which he has not earned.

A composition with creditors (apart from any statutory provisions of the Bankruptcy Acts) is an exception to the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. There is no difficulty as to the consideration between the creditors *inter se*; it is the forbearance on the part of each of them to claim the whole amount of his debt so that no one creditor may gain at the expense of the others. But as regards the debtor, the promise to pay, or the payment of, a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case of *Fitch v. Sutton*. There the defendant, a debtor, compounded with his creditors and paid them 7s. in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him 'from the beginning of the world to that day'. The plaintiff subsequently brought an action for the residue of his claim; the defendant pleaded the acceptance of 7s. in the pound in full of all demands: but Lord Ellenborough said—

Composition with creditors

Good v. Cheesman, 2 B. & Ad. per Parke, B., at p. 335

5 East, 230

'It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for a relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*.'

The consideration, then, furnished by the debtor, if indeed he furnishes any at all, must be something other than the payment of a smaller sum in satisfaction of a larger.

It has been suggested that the consideration furnished by the debtor is the procuring of a promise from each creditor to accept less than the full amount of his debt, thereby conferring a benefit on the creditors generally. This solution is satisfactory so far as it goes, for there is no doubt that such a consideration would be sufficient, but it cannot apply to a case in which the debtor does not in fact procure the creditors' promises. In *Good v. Cheesman*, the case cited in support of this view, the agreement was not merely that each creditor should accept a lesser sum in money in satisfaction of a greater, but 'a consent, by the parties signing the agreement, to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit'. It does not appear whether in fact the debtor actually procured this agreement, but he assented to it, and did more than merely join in the agreement by undertaking to assign one-third of his income to a trustee and to give a warrant of attorney as collateral security. This has been pointed out by Horridge, J., in *West Yorkshire Darracq Co. v. Coleridge*. In that case the directors of a company in liquidation mutually agreed to forgo their claims to fees, the liquidator being made a party to the agreement. Later one of the directors, when sued for money which he owed to the company, counterclaimed for the amount of his fees, and it was held that as the liquidator (who represented the company) was a party to the agreement, he thereby obtained the benefit of the consideration which each director gave to his co-directors by waiving his right to fees, and that the agreement was therefore binding on the director. It is not easy, however, to see how the liquidator, by becoming a party to the agreement, furnished any consideration at all, and both this case and the cases of composition with creditors can be explained

2 B. & Ad.
328

per Lord
Tenterden,
at p. 333

[1911]
2 K B. 328

on another and more satisfactory ground, referred to by Horridge, J., namely, that a party to such an agreement cannot claim his original debt because to do so would be to commit a fraud on the other creditors.

This seems to be also how Jessel, M. R., regarded the case of a composition with creditors. The principle, he says, is that the debt is *satisfied*, so that if one debtor obtains an unfair advantage equity will interfere and make him give it up.

The same principle has been applied in another class of case, of which *Welby v. Drake* and *Hirachand Punamchand v. Temple* are examples. In the former of these cases the creditor had received £9 from the debtor's father in satisfaction of a debt of £18. Abbott, C. J., said that proceedings against the son for the balance of the debt would be a fraud on the father, and held that the payment by the father was a bar to recovery against the son. In the latter case the debtor had told the plaintiffs, his creditors, to apply to his father, and the father in response to their letter sent a cheque for a sum less than the debt in satisfaction, requesting the creditors to return the son's promissory note in return for the cheque. The creditors cashed the cheque, and then sued the son for the balance. The Court of Appeal held that the creditors must be deemed to have accepted the cheque in full satisfaction, and that the son's debt was extinguished. They approved a dictum of Willes, J., in *Cook v. Lister*:

Couldery v. Bartrum,
19 Ch.D. 394

1 C. & P. 557
[1911]
2 K.B. 330

13 C.B.
(N.S.), at
p. 595

'if a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors.'¹

3. *Consideration must be legal.*

This rule should be mentioned here, but we must deal

¹ The judges in the Court of Appeal suggested other grounds in support of their decision, but they were unanimous in holding that the principle laid down in *Cook v. Lister* applied.

Legality
of con-
sideration
Infra,
Ch. VIII

with it later when the time comes to consider, as an element in the Formation of Contract, the legality of the objects which the parties have in view when they enter into a contract.

4. *Consideration may be executory or executed, it must not be past.*

Considera-
tion,

executory,
executed,
and past

We now come to deal with the relation of the consideration to the promise in respect of time. A consideration may be *executory*, a promise given for a promise; or it may be *executed*, an act or forbearance given for a promise; or it may be *past*, but in that case it is a mere sentiment of gratitude or honour prompting a return for benefits received; in other words, it is no consideration at all.

Executory
considera-
tion

As to *executory* considerations, nothing remains to be added to what has been said already. It has been shown that a promise on one side is good consideration for a promise on the other.

Executed
considera-
tion

A contract arises upon executed consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only.

Offer of an
act for a
promise

In the first case a man offers his labour or goods under such circumstances that he obviously expects to be paid for them; the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them. So in *Hart v. Mills* the defendant had ordered four dozen bottles of wine and the plaintiff sent eight; the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles.

15 M. & W.
87

‘The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part. What is it but a new contract as to the part he keeps?’

It must, however, be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance from which he cannot dissent will not bind him. The case of *Taylor v. Laird*, already cited, illustrates this proposition.

25 L. J.
Exch. 329.
Supra, p. 27

A contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services which becomes a promise to give the reward when the service is rendered. In such cases it is not the offeror, but the acceptor, who has done his part at the moment when he enters into the contract. If *A* makes a general offer of reward for information and *X* supplies the information, *A*’s offer is turned into a promise by the act of *X*, and *X* simultaneously concludes the contract and performs his part of it.

Offer of a
promise
for an act

England v.
Davidson,
11 A. & E.
856

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail risk or expense. The request for such services embodies or implies a promise, which becomes binding when liabilities or expenses are incurred. A lady employed an auctioneer to sell her estate; he was compelled in the course of the proceedings to pay certain duties to the Crown, and it was held that the fact of employment implied a promise to indemnify for money paid in the course of the employment. ‘Whether the request be direct, as where the party is expressly desired by the defendant to pay; or indirect, as where he is placed by him under a liability to pay, and does pay, makes no difference.’

Brittan v.
Lloyd, 14 M.
& W 762

It is probably on this principle, the implication of a promise in a request, that the case of *Lampleigh v. Braithwait*, to be referred to presently, is capable of explanation.

Hob. 105

It remains to distinguish executed from past consideration.

Present
disting-
uished
from past
considera-
tion

A past consideration is, in effect, no consideration at all; that is to say, it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. It is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.

Roscorla v.
Thomas,
Q.B. 234

A purchased a horse from X, who afterwards, in consideration of the previous sale, promised that the horse was sound and free from vice. It was in fact a vicious horse. The Court held that the sale created no implied warranty or promise that the horse was not vicious; that the promise must therefore be regarded as independent of the sale, and as an express promise based upon a previous transaction. It fell therefore 'within the general rule that a consideration past and executed will support no other promise than such as would be implied by law'.

To the general rule thus laid down certain exceptions have been said to exist.

Considera-
tion
moved by
previous
request
Hobart, 105

(a) A past consideration will, it has been said, support a subsequent promise, if the consideration was given at the request of the promisor.

In *Lampleigh v. Braithwait*, which may be regarded as the leading case upon the subject, the plaintiff sued the defendant for £120 which the defendant had promised to pay to him in consideration of services previously rendered at his request. The Court here agreed 'that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy were moved by a suit or request of the party that gives the *assumpsit* it will bind;

for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit.'

The case of *Lampleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which, more or less definitely, support the rule as stated above.

But in *Kennedy v. Broun*, in 1863, Erle, C. J., explains the case of *Lampleigh v. Braithwait* from a modern point of view. 13 C.B.,
N.S. 677

'It was assumed', he says, 'that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract: the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such a request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount.'

This would seem to be the *ratio decidendi* in *Wilkinson v. Oliveira*, where the plaintiff at the defendant's request gave him a letter for the purposes of a lawsuit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1,000. Here the plaintiff evidently expected some return for the use of the letter, and the defendant's request for it was, in fact, an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed. 1 Bing. N.C.
490

Regarded from this point of view the rule which we are discussing is no departure from the general doctrine as to past consideration. When a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction, or else as evidence to assist the jury in determining what would be a reasonable sum.

Stewart v. Casey,
[1892] 1 Ch.
per Bowen,
L.J., at p.
115

We may say, therefore, that the rule once supposed to have been laid down in *Lampleigh v. Braithwait* cannot now be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.

Voluntarily doing what another was legally bound to do

(b) We find it laid down that 'where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, *and* the defendant afterwards, in consideration thereof, *expressly* promises', he will be bound by such a promise. But it is submitted that the authority for this rule wholly fails in so far as it rests on the cases which are habitually cited in support of it.

Watson v. Turner, (1767). Buller, Nisi Prius, p. 147. 11 A. & E. 438. See chapter on Quasi-Contract

The cases all turn upon the liability of parish authorities for medical attendance on paupers who are 'settled' in one parish but resident in another, but it is not easy to ascertain the grounds of these decisions from the judgments. Some sentences suggest that they held that a moral obligation would support a promise, but this, since the decision in *Eastwood v. Kenyon*, would be insufficient; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that the relation between the parties was not contractual but quasi-contractual, in which case no question of consideration would arise; others again suggest that the promise was an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties—a liability which clearly does not need a subsequent promise to create it.

Paynter v. Williams, 1 C. & M. 810

It seems clear therefore that these cases do not constitute any exception to the general rule as to past consideration.

The language used in some of the older cases was calculated to make the validity of contracts turn upon a series of ethical problems; and when once the law of

contract was brought into the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced. In *Lee v. Mugeridge*, Mansfield, 5 Taunt. 46 C. J., says, 'It has long been established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is whether upon this declaration there appears a good moral obligation.'

But this doctrine, after it had undergone some criticism from Lord Tenterden, was rejected by the decision in *Eastwood v. Kenyon*. Eastwood had been guardian and agent of Mrs. Kenyon, and, while she was a minor, had incurred expenses in the improvement of her property: he did this voluntarily, and in order to do so was compelled to borrow money, for which he gave a promissory note. When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise he was sued. The moral duty to fulfil such a promise was insisted on by the plaintiff's counsel, but was held by the Court to be insufficient where the consideration was wholly past. 'Indeed', said Lord Denman in delivering judgment, 'the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.'

Littlefield v. Shee, 2 B. & Ad. 811

11 A. & E. 450

Thus was finally overthrown the doctrine formulated by Lord Mansfield, that consideration was only one of various modes, by which it could be proved that parties intended to contract: a doctrine which, in spite of the decision in *Rann v. Hughes*, survived in the theory that the existence of a moral obligation was evidence that a promise was intended to be binding.

7 T.R. 350
(n)

A few words may here be said on the application of the doctrine of consideration to cases of gratuitous bailment or deposit of chattels, and to cases of gratuitous employment.

Gratuitous
bailment

Here the law imposes a liability, independent of contract, upon the depositary or the person employed. The relations of the parties therefore originate sometimes in contract, sometimes in the voluntary act of the party liable, and the cases need to be carefully studied in order to ascertain the precise legal relation with which the Courts are dealing.

A chattel may be bailed, or placed in the charge of a bailee or depositary, for various purposes—for mere custody, for loan, for hire, for pledge, for carriage, or in some other way to be dealt with or worked upon. The relations of the parties may or may not originate in contract: but in every case a duty to use reasonable care is imposed *by law* on the bailee, and failure to use such care constitutes a wrong independently of contract.

Turner v.
Stallibrass,
[1898]
1 Q.B. 60

The bailor has always a remedy for failure to use care; he can bring an action *ex delicto* for negligence. If his matter of complaint extends beyond this he must rely upon the terms of a contract, and if the bailment itself is gratuitous, and an action is brought *ex contractu*, we must seek for the consideration which supports the contract.

Hart v.
Miles, 4 C.B.,
N.S. 571

Thus *A* allowed two bills of exchange to remain in the hands of *X*, and *X* thereon promised that if he could get the bills discounted he would do so and pay the proceeds to the account of *A*. This promise was held to be made on good consideration, namely, the permission given to *X* to retain the custody of the bills.

It will be noted that the bailee here undertook something more than mere custody, that the action was *ex contractu*, and that therefore consideration was required to be shown.

Bainbridge
v. Firm-
stone, 8 A.
& E. 743

In the case of bailment of a chattel a consideration may sometimes be found in the owner having parted with the possession at the request of the bailee. But no such consideration is to be found in cases of gratuitous employment, and here therefore we must look for another explanation.

Gratui-
tous
employ-
ment

A offers to do *X* a service without reward: the offer is accepted: no action would lie if the service were not per-

formed, because there is no consideration for the promise of *A*: and yet there is abundant authority for saying that if the service is in fact entered upon, and performed so negligently that *X* thereby suffers loss or injury, there is a liability which the Courts would recognize.

A promised *X* to build him a warehouse by a certain day. *X* sued *A* for non-completion of the warehouse within the promised time, and also for having increased the cost of the building by having used new materials instead of old materials, which he was ordered to use as far as they would go. The promise of *A* was gratuitous, and the Court held that, on this account, he was not liable on his promise to complete within a given time; but that, having entered on the work and by disobedience to orders increased its cost, he was liable for a misfeasance.

Elsee v.
Gatward,
5 T.R. 143

It seems better then to dismiss the conception of contract from these cases and regard them as cases of negligence, placing them on the broad ground adopted by Willes, J., in *Skelton v. L. & N. W. Railway*: 'If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it'; or alternatively we may say that our law has here borrowed from Roman law the contract *Mandatum*. In that contract no liability was created until the service asked for was entered upon; thenceforward the one party was bound to use reasonable care in performance, the other to indemnify against loss incurred in doing the service. Such liabilities, reasonable enough in themselves, cannot be reconciled with the English doctrine of Consideration; they are in fact, as has been shown in the historical introduction contained in Chapter I of this book, anterior in time to the evolution of that doctrine.

L.R. 2 C.P.
636

Perhaps
analogous
to *Man-*
datum
Coggs v.
Bernard,
2, Ld Raym.
at p. 919

The liabilities which arise on a gratuitous bailment of a chattel or on a gratuitous loan of money to return the chattel or repay the money, as the case may be, similarly existed before the doctrine of Consideration, and were enforced by the action of detinue and debt respectively,

both in their origin *real* or recuperatory actions. They may perhaps now be brought within the modern conception of contract on the ground that the bailor or the lender furnishes Consideration by handing over the chattel or making the loan.

Foreign
contracts
and the
doctrine
of Con-
sideration

We have been discussing throughout this chapter the rules of English law relating to Consideration. It must not, however, be forgotten that English Courts may from time to time have to entertain actions relating to contracts which are not governed by English law. The rules which determine the law which governs a contract, or, as it is called, the 'proper law' of the contract, are a branch of private international law and cannot be discussed in this place.¹ If, however, it should be ascertained that the proper law of the contract before the Court is not the law of England, the question whether the contract is a valid one will not be determined by English law, and reference must be made to the proper law of the contract to determine whether Consideration is required for its validity. This is what happened in the case of *In re Bonacina*, where the effect of a 'privata scrittura' in Italian law was considered. It was proved that a promise in this form based upon the moral obligation to pay a just debt created according to Italian law a new and valid legal obligation which would be enforced in the Italian Courts. The proper law of the contract being Italian law, the Court of Appeal held that the English doctrine of Consideration did not apply, and that the contract, being valid by its proper law, was enforceable in England.

The King v.
International
Trustee
for protec-
tion of Bond-
holders Ac-
tiengesell-
schaft,
[1937] A C.
500

[1912] 2 Ch.
394

Note on the recommendations of the Law Revision Committee on the doctrine of Consideration.

In their Sixth Interim Report in 1937 [Cmd. 5449] the Committee have made a number of recommendations for drastic amendments of the law. They point out, among other criticisms,

¹ The student may be referred to Cheshire, *Private International Law*, 2nd ed., p. 250, for a discussion of this matter.

that the doctrine of consideration cannot be justified as a means of distinguishing between onerous and gratuitous agreements because adequacy of consideration is immaterial, and some promises which are technically supported by consideration are, in fact, nothing but purely gratuitous promises; that serious business inconvenience may be caused by the rule that a promise to pay a smaller sum in discharge of a greater is invalid unless made under seal, and that this has led to devices for circumventing the rule, such as that a change in the time or mode of payment, often quite illusory in character, or the addition by the debtor of 'a canary or a tom-tit', will constitute consideration for the creditor's promise to forgo part of his debt; that it may defeat the reasonable expectations of a party in the common case of a gratuitous promise to keep an offer open for a stated period, on the strength of which the offeree may have incurred trouble and expense for which he will have no remedy. The Committee sum up the present position by saying that in many cases the doctrine is a mere technicality, irreconcilable either with business expediency or common sense.

They do not, however, recommend its total abolition. Their main proposal is that an agreement should be enforceable if *either* the promise or offer has been made in writing by the promisor or his agent, *or* if it is supported by valuable consideration, past or present. This in effect would establish the law as it was laid down by Lord Mansfield in *Pillans v. Van Meierop*.

Supra, p. 86

Besides this the Committee recommend certain particular amendments in the doctrine:

(a) An agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum should be deemed to have been made for valuable consideration, but if the new agreement is not performed, then the original obligation should revive;

(b) An agreement in which one party makes a promise in consideration of the other doing or promising to do something which he is already bound to do by law, or by a contract either with the other party or with a third party, should be deemed to have been made for valuable consideration. But to this the Committee make the proviso that such agreements must be free from objection on the score of legality or public policy; e.g. a promise in return for an agreement by a police authority to give precisely the protection it is bound to give by law should not be enforceable;

(c) A promise should be enforceable by the promisee though the consideration is given by or to a third party (that is to say, it should not be necessary that consideration should move from the promisee);

(d) An agreement to keep an offer open for a definite period or until the occurrence of some specified event should not be unenforceable by reason of the absence of consideration;

(e) A promise made in consideration of the promisee performing

an act should constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed (that is to say, a promisee should not be able, as he is under the present law, to withdraw his offer after the offeree, to his knowledge, has entered upon the performance);

(f) A promise which the promisor knows, or reasonably should know, will be relied on by the promisee should be enforceable if the promisee has altered his position to his detriment, in reliance on the promise. (As the law stands, 'where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time'. But this rule applies only when the representation is one of *fact*; it does not apply to a representation of *intention*, and one who acts upon such a representation has no redress unless there is a contract, i.e. unless the representation amounts to a promise for good consideration. The proposal would alter this.)

(g) The proposals of the Committee as to the rights of a stranger under a contract purporting to confer a benefit on him can be more conveniently considered in a later chapter.¹

¹ The student will find it useful to refer to an address by Lord Wright in his Legal Essays and Addresses, 'Ought the doctrine of Consideration to be abolished from the Common Law?' and to an article by Mr. C. J. Hamson, 'The Reform of Consideration', in L.Q.R., vol. 54, p. 233. The latter points out certain difficulties which the Committee's proposals raise.

Pickard
v Sears,
6 A. & E. 469

Infra, p. 259

CHAPTER IV

Capacity of Parties

IN the topics which we have hitherto discussed we have assumed that the transaction takes place between parties neither of whom is under any disability for making a valid contract. It is now necessary to deal with disabilities: in other words, with the Capacity of Parties. Certain persons are by law incapable, wholly or in part, of binding themselves by a promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:

Causes of contractual incapacity

- (1) Political or professional status.
- (2) Youth, which, until the age of 21 years, is supposed to imply an immaturity of judgment needing the protection of the law.
- (3) Corporate personality.
- (4) The permanent or temporary mental aberration of lunacy or drunkenness.
- (5) Marriage.

§ 1. *Political or Professional Status*

An alien has ordinarily the contractual capacity of a natural-born British subject, except that he cannot acquire property in a British ship: Merchant Shipping Act, 1894, s. 1.

Aliens

In time of war, however, an alien who is an enemy, so far as concerns his capacity to contract or to enforce contracts already made, is subject to severe restrictions.¹ During both the Great Wars these restrictions were further increased by Trading with the Enemy Acts which made dealings of all kinds, direct and indirect, with or for the benefit of the King's enemies a criminal offence; but it will be sufficient here to indicate the Common Law rules upon the subject.

Alien enemies

¹ This subject is exhaustively treated in McNair, *Legal Effects of War*, 2nd ed. (1944).

[1915] 1 K.B.
857

We must note in the first place that nationality is not the test of enemy status for this purpose. The full Court of Appeal in *Porter v. Freudenberg*, after reviewing all the authorities, laid it down that the place where the person in question voluntarily resides or carries on business is the determining factor; so that an enemy subject who resides or carries on business exclusively in a neutral country or (with the licence of the Crown) in Great Britain itself, may contract or sue on the same footing as an alien friend. Conversely, a British subject or a neutral residing or carrying on business in an enemy country (which for this purpose includes territory occupied by the enemy) is in the same position as an alien enemy. A corporation has the character of an enemy if either it is incorporated according to the laws of an enemy state, or, wherever incorporated, 'its agents or the persons in de facto control of its affairs . . . are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies'.

Sovfracht v. N. V. Gebr. van Udens,
[1943] A.C.
203

Daimler Co. v. Continental Tyre Co.,
[1916] 2 A.C.
at p 344

The Hoop,
1 C. Rob.
196

Porter v. Freudenberg, [1915]
1 K.B. 857

Rodriguez v. Speyer Bros.,
[1919] A.C.
59

The position of an alien enemy as above defined appears to be as follows. (1) He cannot, during the continuance of the war, enter into any contract with a person who is in, or is carrying on business in, Great Britain. (2) He cannot until the war is over sue in the King's Courts on any cause of action which has accrued before the war, but this rule is not an inflexible rule of law but one of public policy, and will therefore not be enforced where the effect of enforcing it would be to do injustice to British subjects, e.g. where it is necessary in order that an action may proceed to join an alien enemy as a co-plaintiff. The right of action, however, is only suspended, and not destroyed, by the war. (3) He may, if he can be duly served with a writ, be sued on a cause of action which has accrued before the war and may appear and defend the action, and, if unsuccessful, may appeal to a higher tribunal. (4) Contracts made before the war between a person who is in, or is carrying on business in, Great Britain and an alien

enemy which involve intercourse between the parties, or the continued existence of which is contrary to public policy, are wholly dissolved by the outbreak of war. An obvious example of the former is a partnership; of the latter a contract which if performed would be of assistance to the commerce or economic interests of the enemy state or detrimental to those of this country. Far the majority of contracts fall under this head. (5) If a contract does not fall within the above description, the contract itself is not dissolved, but its performance may be suspended for the duration of the war. It seems probable that this result is confined to certain contracts which, in a phrase used by Lord Dunedin, are 'really the concomitants of rights of property'. The shareholder's contract of membership in a company, and (probably) the contract between an insurance company and a policy-holder, supply examples. (6) It appears that there are a few contracts, which are more than contracts, for instance, a lease, which, though *prima facie* falling into category (4) above, are not affected by the outbreak of war, except of course that an alien enemy cannot enforce them during the war.

Contracts have sometimes been framed with elaborate clauses providing that on the outbreak of war their obligations shall be wholly suspended for the time being but shall revive at the conclusion of peace. The Courts regard very jealously contracts of this kind and have not hesitated to declare them to be wholly at an end, if public policy appears to demand it. Private individuals, it has been observed, are not to be allowed to dictate the conditions under which a contract shall or shall not be finally determined by the outbreak of war. Nor are the obligations of a contract suspended only by the outbreak of war and not dissolved, if the practical effect of suspension would involve the making of a new contract between the parties. The performance of mutual obligations under an executory contract cannot be postponed until the war is over, if the postponement would effect a substantial altera-

Stevenson v.
Akt für Car-
tonnagen-
Industrie,
[1918] A.C.
239

Zinc Cor-
poration v.
Hirsch,
[1916] 1 K.B.
541

Ertel Bieber
v. Rio Tinto,
[1918] A.C.
at p. 269

Seligman v.
Eagle Insur-
ance Co.,
[1917] 1 Ch.
519

Halsey v.
Lovenfield,
[1916] 2
K.L. 707

Ertel Bieber
v. Rio Tinto,
[1918] A.C.
260

Distington
Iron Co. v.
Possehl,
[1916]
1 K.B. 811

tion in the terms of the original contract ; and where this is the case, the contract is at an end. But these matters relate rather to the discharge than to the formation of contract.

Schaffenius v. Goldberg,
[1916] 1 K.B.
284

The Crown may at its discretion grant a licence to an alien enemy to contract and sue in time of war, and in that case his position will be exactly the same as that of an alien friend. Such a licence need not be given formally ; it is enough that the alien enemy is resident in this country by the tacit permission of the Crown, and he does not lose his capacity to contract or to sue on his contracts even if he is interned, at any rate if his internment is a mere act of general policy. It is possible, however, that the circumstances of his internment might imply the revocation of his licence.

Foreign
sove-
reigns

Diplomatic
Privileges
Act, 1708

Taylor v.
Best, 14

C.B. 487

In re Bolivia
Syndicate,
[1914] 1 Ch.
139

Macartney
v. Garbutt,
24 Q.B.D.
368

Mighell v.
The Sultan
of Johore,
[1894] 1 Q.B.
149

The position of foreign states and sovereigns may also be conveniently referred to in this place. They have full *capacity* to enter into contracts in England, but neither they nor their representatives nor the officials and household of their representatives are in any way subject to the jurisdiction of the English Courts. Their contracts cannot therefore be enforced against them, although they are capable of enforcing them. This immunity extends to a British subject accredited to Great Britain by a foreign state.

The following case illustrates the rule. A foreign sovereign residing in this country as a private person made a promise of marriage under an assumed name. It was held that he had not thereby subjected himself to the jurisdiction ; his immunity would be lost only if he waived it at the time when the Court was asked to exercise its jurisdiction, and not by anything done before that time.

Felon un-
dergoing
sentence

Forfeiture
Act, 1870,
ss. 8, 9, 10

A person convicted of treason or felony cannot, during the continuance of his sentence, make a valid contract ; nor can he enforce contracts made previous to conviction : but these may be enforced by an administrator appointed for the purpose by the Crown.

A barrister cannot sue for fees due to him for services rendered in the ordinary course of his professional duties, whether the action be framed as arising upon an implied contract to pay for services rendered on request, or upon an express contract to pay a certain sum for the conduct of a particular business. If, however, the solicitor has paid counsel's fee, he is entitled to recover it from the lay client.

Barrister

Kennedy v.
Broun,
13 C.B.
N.S. 677Medlicott
v. Emery,
149 L.T. 303

A physician, until the year 1858, was so far in the position of a barrister that the rendering of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. The Medical Act, 1858, s. 31, enabled every physician to sue on such an implied contract, subject to the right of any College of Physicians to make by-laws forbidding its Fellows to sue for their fees—a right which has been exercised by the Royal College of Physicians. And this is re-enacted in substance by the Medical Act, 1886.

Physician

§ 2. *Infants*

The rights and liabilities of infants under contracts entered into by them during infancy rest upon Common Law rules which have been materially affected by statute. It will be convenient first to state the Common Law upon the subject.

At Common Law the only class of contract to which when made by an infant the plea of infancy did not afford a complete defence was a contract for 'necessaries', in the sense to be explained later. In all other cases Common Law treated an infant's contracts as being voidable at his option, either before or after the attainment of his majority.

General
rule of
Common
Law

But these voidable contracts must be divided under two heads:

(a) Contracts which were valid and binding on the infant *until he disaffirmed them*, either during infancy or within a reasonable time after majority;

(b) Contracts which were not binding on the infant

until he ratified them within a reasonable time after majority.

Contracts
valid till
rescinded

(a) Where an infant acquired an interest in permanent property to which obligations attached, or entered into a contract involving continuous rights and duties, benefits and liabilities, and took some benefit under the contract, he would be bound, unless he expressly disclaimed the contract.

Illustrations may be found in the following cases. They do not appear to be affected by subsequent legislation.

N. W. Ry.
Co. v.
McMichael,
5 Exch. at
pp. 127-8

An infant lessee is liable for rent until he disclaims the lease; and if he does not disclaim before or within a reasonable time after majority, he will lose the right to disclaim at all.

An infant shareholder is under a similar liability for calls on his shares. He may avoid the liability by disclaiming the shares, even though the disclaimer only takes place when the call is made, but if he does not disclaim either before or at majority he will lose the right.

The grounds of an infant's liability in such cases have been thus stated:

Ibid.,
pp. 123-4

‘They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they are bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.’

The effect of the disclaimer of such a contract either during minority or within a reasonable time after majority is to release the infant from his obligations under it. But it will not entitle him to recover anything that he may have

already paid under the contract unless there has been a total failure of the consideration for which the money has been paid. In *Steinberg v. Scala* an infant was allotted shares in a company, and paid the amounts due on application and allotment, and on the first call. She received no dividends and attended no meetings of the company, and after eighteen months she claimed to repudiate the allotment and recover the amounts paid. It was held by the Court of Appeal that while she was entitled to rescind the contract by having her name removed from the register of shareholders, and thus to avoid liability for the unpaid instalments, she was not entitled to recover back the money she had paid, since she had received something which both had a marketable value and was in any case the very consideration for which she had bargained.

[1923] 2 Ch.
452

The following cases illustrate the conditions which must be satisfied in order that an infant's disclaimer of a contract of this character may take effect:

An infant received an assignment of shares in 1883: he said he would repudiate them, but did not do so. He reached full age in 1886: in 1887 the Company was wound up and he was not permitted to take his name off the list of contributories.

In re
Yealand's
Consols,
58 L.T. 922

An infant became a member of a building society, received an allotment of land, and for four years after he came of age paid instalments of the purchase money. Then he endeavoured to repudiate the contract. He was not permitted to do so.

Whitting-
ham v.
Murdy, 60
L.T. 956

An infant became a party to a marriage settlement, under which he took considerable benefits. Nearly four years after coming of age he repudiated the settlement. It was held that a contract of this nature was binding unless repudiated within a reasonable time of the attainment of majority, and that he was too late.¹

Carter v.
Silber,
[1892]
2 Ch. 278
Edwards v.
Carter,
[1893] A.C.
360

¹ Note, however, that by the Infants' Settlement Act, 1855, a male infant if over twenty and a female infant if over seventeen, can, with the sanction of the Court, make a binding marriage settlement; and this may be done either before or after the marriage.

Lovett v.
Lovett,
[1898] 1 Ch.
82

The position of an infant member of a partnership differs from that of an infant shareholder. It is true that partnership is a continuous relationship between the partners, but by becoming a partner an infant does not acquire an interest in a subject of a permanent nature to which obligations are attached.

Equity indeed will not allow an infant, in taking the partnership accounts, to claim to be credited with profits and not debited with losses. But he is not liable, either during minority or after majority, and whether or not he disclaims the partnership, to creditors of the firm for debts incurred by it during his infancy. If he continues to act as a partner after majority he will, of course, be liable, equally with his co-partners, for the debts subsequently incurred, and he may also make himself liable for such debts if, though ceasing to act as a partner, he does not notify his withdrawal from the partnership to persons dealing with the firm. Thus where an infant held himself out as in partnership with X, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, he was held liable on debts which accrued, after he came of age, to persons who supplied X with goods. The liability in this case, however, merely illustrates a general rule of the law of partnership applicable to any retired partner, and does not depend on any principle peculiar to the law of infancy.

Lovell &
Christmas v.
Beauchamp,
[1894] A.C.
607

Goode v.
Harrison,
5 B. & Ald.
159

Contracts
not bind-
ing unless
ratified

(b) In the case of contracts that are not thus continuous in their operation, the infant was not bound unless he expressly ratified them upon coming of age. Thus a promise to perform an isolated act, such as to pay a reward for services rendered, or a contract wholly executory, and indeed all other contracts other than continuing contracts or contracts for necessities, required an express ratification.

As both these classes of contract at Common Law were only voidable at the option of the infant and not wholly void, there was no objection to the infant enforcing them,

though they could not be enforced against him. But in one respect his position as a plaintiff differed from that of other contracting parties. Though he might recover damages he could not obtain specific performance, for the reason that the contract could not be *mutually* enforced; for specific performance, being an equitable remedy which is in the discretion of the Court to grant and cannot be claimed as of right, is not granted in such circumstances.

Flight v. Bolland,
4 Russ. 298

Infra, p. 378

Such was the Common Law upon the subject; let us consider how it has been affected by legislation.

The Infants' Relief Act of 1874 appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority. Its provisions are as follows:

Infants'
Relief Act

1. 'All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of Common Law or Equity enter, except such as now by law are voidable.

2. 'No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.'

The precise meaning of the provisions of this Act is not at first easy to ascertain, but its effect may be summarized as follows:

1. Three classes of infants' contracts are, for the first time, made 'absolutely void'; namely, for the repayment of money lent or to be lent; for goods supplied or to be supplied¹ to the infant (other than necessities); and accounts stated with infants.

Effect of
Act, s. 1

Infra, p. 430

¹ The term was held to cover an exchange of goods in *Pearce v. Brain*, [1929] 2 K.B. 310.

2. (a) Contracts for 'necessaries' are not affected by the Section; nor (b) are contracts into which an infant could validly enter at the date of the Act and which at the same time were not voidable by him.

s. 2

3. It is no longer possible for an infant to ratify after majority contracts of the class which before the Act were not binding unless ratified; and this is so, whether there is a new consideration for the promise or ratification after majority or not.

4. Contracts which before the Act were binding until disaffirmed are not affected by the Act.

We may now consider these four points in greater detail.

(1) The following cases illustrate the meaning of the words 'absolutely void' in Section 1:

Decisions
on s. 1

R. v. Wilson,
5 Q.B.D.
28

Ex parte
Jones, 18 Ch.
D. 109

Levene v.
Brougham,
25 T.L.R.
265

An infant who had contracted trading debts was convicted on an indictment charging him with having defrauded his creditors within the meaning of the Debtors' Act, 1869. The conviction was quashed on the ground that the transactions which resulted in debts were void under the Infants' Relief Act. There were consequently no creditors to defraud. On the same reasoning an infant cannot be made a bankrupt in respect of such debts.

The Court of Appeal has held that a false representation by an infant that he was of full age, whereby the plaintiff was induced to lend him money, cannot impose any contractual liability upon him by way of estoppel or otherwise; for the Act makes such a contract 'absolutely void'.

These cases were ostensibly decided under the Infants' Relief Act, but it is believed that they would not have been decided differently if the Act had not been passed and the contracts had been, not 'absolutely void', but, as they were at Common Law, voidable at the infant's option. No case seems yet to have made clear the precise difference that Section 1 of the Act has made in the contracts to which it refers.

It is difficult to believe that the section was intended to deprive the contracts to which it relates of all legal con-

sequences. It can hardly be supposed, for example, that if a tradesman were to supply goods to an infant under a contract which the section makes 'absolutely void', he could recover them from an innocent purchaser from the infant; indeed, there is authority for saying that if goods are delivered under such a contract, the property in them will pass to the infant. It has been held also that if an infant has paid money and taken benefit under the contract he cannot recover the money so paid.

Stocks v. Wilson,
[1913] 2 K.B.
at p. 246

An infant hired a house and agreed to pay the landlord £100 for the furniture. He paid £60 and gave a promissory note for the balance. After some months' use of the house and furniture he came of age, and then took proceedings to get the contract and the promissory note set aside, and to recover the money which he had paid. He obtained relief from future liabilities on the contract and note, but could not recover money paid for furniture of which he had enjoyed the benefit. 'No doubt,' said Lord Coleridge, C. J., 'the words of the Infants' Relief Act, 1874, are strong and general; but a reasonable construction ought to be put upon them. . . . When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid.' It seems to follow from this reasoning, as well as from the words of the section itself, that if the infant has taken no benefit under such a contract, he may recover back money paid under it.

Valentini v. Canali, 24
Q.B.D. 166

Goods
paid for
and used

Pearce v. Brain,
[1929] 2 K.B.
310

The section, therefore, does not seem to have put the infant in a position which is more favourable to him than that which he enjoyed at Common Law; indeed, there was no reason why it should. On the contrary, it is possible that it has made his position less favourable; for whereas at Common Law he could enforce the contract, it is difficult to see how he can enforce a contract which the Act declares to be 'absolutely void'. For that it would be necessary to construe those words as meaning merely 'void as against the infant'.

Contracts
for neces-
sary
goods

(2) (a) A contract 'for goods supplied or to be supplied', which is a contract for 'necessaries', is excepted from the operation of Section 1, and is therefore still governed by the Common Law. But a part of the Common Law on this matter has been given statutory form by the Sale of Goods Act, 1893, which enacts in s. 2:

'Where necessaries are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

'Necessaries in this section means goods suitable to the condition in life of such an infant or minor or other person and to his actual requirements at the time of sale and delivery.'

What are
neces-
saries?

We must first consider what the phrase 'necessaries' includes.

It has always been held that an infant may render himself liable for the supply to him, not merely of the necessaries of life, but of things suitable to his station in life and to his particular circumstances at the time. The *locus classicus* on this subject is the judgment of Bramwell, B., in *Ryder v. Wombwell*—the conclusions of which were adopted by the Exchequer Chamber. In such cases the provinces of the Court and of the Jury are as follows:

L.R. 3 Ex.
90
L.R. 4 Ex.
32

Nash v. In-
man, [1908]
2 K.B. 1

Evidence being given of the things supplied and of the circumstances and requirements of the infant, the Court determines whether the things supplied can reasonably be considered necessaries at all; and only if it comes to the conclusion that they can, may the case be submitted to the jury.

Bramwell,
B., in *Ryder*
v. *Womb-*
well

Things may be obviously outside the range of possible necessaries. 'Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested.'

Things may be of a useful character but the quality or quantity supplied may take them out of the character of necessaries. Elementary text-books might be a necessary to a student of law, but not a rare edition of 'Littleton's Tenures', or eight or ten copies of 'Stephen's Commentaries'. Necessaries also vary according to the station in life of the infant or his peculiar circumstances at the time.

It does not follow, therefore, that because a thing is of a useful class, a judge is bound to allow a jury to say whether or no it is a necessary.

But if the judge concludes that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, in the circumstances of the case, the things supplied were necessities in fact. And the jury must then take into consideration the character of the goods supplied, the actual circumstances of the infant, and the extent to which the infant was already supplied with them. It is necessary to emphasize the words 'actual circumstances', because a false impression conveyed to the tradesmen as to the station and circumstances of the infant will not affect the infant's liability; if a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class not knowing that the infant is already sufficiently supplied, he does so at his peril.

When question left to jury

What the plaintiff must prove

Sale of Goods Act, s. 2

'Having shown that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendant's witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes on him.'

Nash v. Inman, [1908] 2 K.B. 1, *per* Cozens-Hardy, M.R. at p. 5

A loan of money to an infant to pay for necessities was not recoverable at Common Law; but in Chancery it was held that if an infant borrowed money to pay a debt for which by law he was liable, and the debt was actually paid therewith, the lender 'stood in the place of the person paid' and was entitled to recover the money lent. The liability in respect of such a loan rests, however, on a principle of equity which is of wider application than the rule as to necessities.

Loan for necessities

Marlow v. Pittfield, 1 P. Wms. 558

(b) Contracts into which an infant may enter 'by any existing or future statute or by rules of Common Law or

The proviso in s. 1

Equity', and which were not voidable at the date of the enactment, are taken out of the Act by the proviso to Section 1. It was pointed out by Kekewich, J., in *Duncan v. Dixon* that according to the ordinary rules of construction the effect of this proviso must be to except from the earlier part of the section some contracts, which, but for the proviso, would be within it. The class so excepted is then cut down by excepting from it (and therefore presumably leaving to the operation of the section) any contract which was voidable at the date of the Act.

The words are extraordinarily obscure, and it is not easy to find a contract which falls within this class when so limited. We have to find a contract which is not one for necessities in the sense of goods necessary for the infant (for these the section has already excepted), and which yet was not voidable by the infant before the Act. Such a class of contract does exist, but it is a class which the section would not in any case, that is to say, even if the proviso had not been inserted, have affected; for the contracts which it includes do not belong to any of the three specific kinds of contract which the operative words of the section invalidate. We can only suppose that the proviso was inserted *ex majori cautela* to ensure that these contracts should not be affected.

Instances of the class of contract in question are to be found where an infant enters into a contract of service so as to provide himself with the means of self-support, or one for the purpose of obtaining instruction or education to fit himself to earn his living at a suitable trade or profession. Such contracts are in fact contracts for 'necessaries' in a wider sense, and are so described in the cases.

Walter v.
Everard,
[1891]
2 Q.B. 369

Clements v.
L. & N.W.
R. Co.,
[1894] 2 Q.B.,
per Kay,
L. J. at p. 491

'It has always been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence. The question has always been whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If so the Court will not allow the infant to repudiate it.'

In the case cited an infant entered into a contract of

service with a Railway Company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers' Liability Act, 1880. It was held that the contract was, taken as a whole, for his benefit and that he was bound by his promise.¹ And an infant may be held liable for the breach of such a contract under the Employers and Workmen Act, 1875.

Leslie v.
Fitzpatrick,
3 Q.B.D.
229

On the other hand, an agreement by an infant, on entering the service of a Sheffield newspaper, never during the rest of his life to become connected with any other newspaper within twenty miles of Sheffield, was held in *Leng v. Andrews* to be more onerous than beneficial and the infant was entitled to repudiate it, apart altogether from the question whether it was void as being in restraint of trade.

[1909] 1 Ch.
763

But even though an infant's contract of service contain some stipulations which are void as being in restraint of trade, it does not necessarily follow that he may repudiate the whole contract, for under the rules which are applicable to this class of contract it is sometimes permissible to sever the void stipulations from the rest of the contract. In that event, if the contract, after the void stipulations have been struck out of it, is on the whole beneficial to the infant, he will be bound by it.

Bromley v.
Smuth,
[1909]
2 K.B. 235

Infra, p. 233

Olsen v.
Corry, 155
L.T. 512

The class of contracts under consideration, however, does not include every contract which, taken as a whole, may be said to be beneficial to the infant; it is a limited class, though the limits are not easy to state. It does not include ordinary trading contracts, as, for instance, the purchase of a motor lorry by an infant carrying on business as a haulage contractor. In *Doyle v. White City Stadium Ltd.*, however, the Court of Appeal held that a contract by a professional boxer, in consideration of his receiving

Mercantile
Union
Guarantee
Corp. v.
Ball, [1937]
2 K.B. 496
[1935] 1 K.B.
110

¹ No civil proceedings can, it seems, be taken against an infant on an apprenticeship deed; but if he misbehave he may be corrected by his master, or brought before a justice of the peace: *Gylbert v. Fletcher*, Cro. Car. 179; *De Francesco v. Barnum*, 43 Ch. D. 165. A covenant in an apprenticeship deed to do or abstain from doing something after the apprenticeship has ceased may, however, be enforced by action: *Gadd v. Thompson*, [1911] 1 K.B. 304.

a licence from the Boxing Board of Control, to be bound by the rules of the Board and by any alterations the Board might make in the rules, was binding on him despite his being an infant. The ground of the decision was that this contract was practically essential in order to enable the infant to make another contract—namely, an engagement to box for the heavyweight championship—which the Court held to be itself binding on the infant as being a contract of employment which was for his benefit. The judgments do not define the contracts which are binding on an infant when beneficial to him, but they perhaps indicate a tendency to enlarge the class; for it might be thought that the contract which the infant had made in this case was merely one incidental to the carrying on of a trade or profession and therefore of a kind which has not hitherto been believed to be binding, even when beneficial.

Grounds
of lia-
bility

‘It remains to consider the nature of the infant’s liability for necessities, as to which some doubt exists. The liability for necessary goods supplied has been thus explained by Fletcher Moulton, L. J., in *Nash v. Inman*:

[1908]
2 K.B. 1, 8

‘An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic, the law will imply an obligation to repay him for the services so rendered and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*.’

Pontypridd
Union v.
Drew, [1927]
1 K.B. at
p. 220

To the same effect Scrutton, L. J., after saying that the old course of pleading in such an action was a count for goods sold and delivered, a plea of infancy, and a replication that the goods were necessities, has pointed out that the plaintiff did not necessarily recover the price alleged, but a reasonable price. ‘That,’ he adds, ‘does not imply a consensual contract.’

Goods
to be
supplied

It will be observed that the Sale of Goods Act deals only with ‘necessaries sold and delivered’, and says nothing of

necessaries sold to an infant, but *not* delivered, that is to say, of a contract of sale which is still executory. It is possible, for instance, that an infant might order goods which were necessaries when ordered, but that his needs might be met from some other source before the goods were delivered. It is conceived that his liability on an executory contract of sale still rests on the Common Law, and there does not appear to be any case in which an infant has been held liable for the non-acceptance of necessaries or on a contract for necessaries bargained and sold. If, as Fletcher Moulton, L. J., thought, his obligation arises *re* and not *consensu*, he could not be held liable in such a case.

Contracts of service, education, and the like, provided they are beneficial to the infant, have, however, always been regarded as merely one variety of his contracts for 'necessaries', and there seems to be no authority for regarding the nature of the liability which they create as resting on a different basis from that of contracts for the supply of necessary goods. But in *Roberts v. Gray* the Court of Appeal rejected the view that a contract for necessaries in this wider sense was not binding on an infant while it was still executory. In that case an infant defendant had repudiated a contract in which he had agreed to join the plaintiff in a world tour as 'professional billiard-ists'. The Court held that to play in company with a noted billiard player like John Roberts was instruction of the most valuable kind for an infant who desired to make billiard playing his occupation, and they upheld an award of £1,500 damages for the breach. 'I am unable to appreciate,' said Hamilton, L. J., 'why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory.' Both this decision and that in the case of *Doyle v. White City Stadium Ltd.* imply that the nature of an infant's liability, when he is liable on a contract at all, does not differ from that of a

[1913] 1 K B.
520

[1935]
1 K.B. 110

contracting party of full capacity; that it is, in fact, a true contractual liability, arising *consensu* and not merely *re*. It is believed that they have introduced an innovation into the law, but in the present state of the authorities it is difficult to state the nature of the infant's liability with assurance.

Section
2 of the
Act of
1874

(3) The second section of the Act of 1874 makes it impossible for a man of full age to make himself liable upon a contract entered into during infancy, even though there be a fresh consideration for his ratification of such contract. This can only affect the class of contracts which at Common Law required an express ratification, which of course includes those now rendered void by section 1.

But we must note some points which are not quite obvious on reading the section.

Infant can
enforce
contract

In the first place, it should be noted that though the infant cannot now make a contract enforceable against himself by ratifying it after full age, this section does not affect his right to enforce it against the other party. The words of the section do not avoid the promise or ratification after full age; they only make it unenforceable against one of the parties to it. It may be, as has already been said, that section 1, by making the contracts to which it relates 'absolutely void', has made it impossible for the infant to sue on those contracts, either during infancy or if he ratifies them after full age, but with this possible exception the position as regards the enforcement of his contracts by an infant remains as it was at Common Law.

Secondly, the Courts have been strict in their application of the first part of section 2, that is to say, when the promise is to pay a debt contracted during infancy.

Smith v.
King, [1892]
2 Q B 543

King, an infant, became liable to a firm of brokers for £547: after he came of age they sued him, and he compromised the suit by giving two bills of exchange for £50. The firm endorsed one of the bills to Smith, who took the bill with knowledge of all the circumstances, and sued upon it. The Queen's Bench Division held that the bills were a promise, based on a new consideration, to pay a debt con-

tracted during minority, that here was a ratification of the sort contemplated by the Act, and that Smith could not recover.

In dealing with promises other than to pay a debt the difficulty of distinguishing between the ratification of an old promise and the making of a new one has led to extreme refinements. Strictly construed the Act would make it impossible for a man to become liable on any agreement made during infancy.

Ratifica-
tion and
new pro-
mise

Where parties to mutual promises of marriage remain on the footing of an engaged couple after the promisor has attained his majority, the maintenance of the engagement has been held to be a ratification and therefore insufficient to sustain an action for breach of the promise. But where the mutual promises made during infancy are conditional on consent of the man's parents, and the promise is renewed by him after majority with their consent; or where an engagement is made during infancy with no date fixed for the marriage, and after attaining majority the parties agree to name a day on which it shall take place, the promises so made have been held to be new promises and the breach of them is actionable. The question whether there has been a new promise or only a ratification of a promise made during infancy is, however, one of fact for the jury.

Coxhead v.
Mullis, 3
C.P.D. 439

Northcote v.
Doughty, 4
C.P.D. 385

Ditcl. am v.
Worrall, 5
C.P.D. 410

(4) Lastly, the contracts which were binding at Common Law unless repudiated before or within a reasonable time after majority are not affected by the Act of 1874. They cannot be affected by section 1, for that section deals with three specific contracts only, of which these are not one; and they are not affected by section 2, because the liability under them does not arise from any 'promise' or 'ratification made after full age'.

Contracts
valid
till dis-
affirmed
not
affected
by Act
Carter v.
Silber,
[1892] 2 Ch
per Lindley,
L. J., at
p. 284
Infant
may not
be charged
upon con-
tract
framed
as a tort,

An infant is liable for wrong: but a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the

Jennings v. Rundall, 8 T.R. 335

Leslie v. Sheill, [1914] 3 K.B. 607

Stocks v. Wilson, [1913] 2 K.B. 235

but may for actual tort, though originating in contract

Burnard v. Haggis, 14 C.B., N.S., 45

Ballett v. Mingay, [1943] 1 K.B. 281

Equitable remedy against infant

Stocks v. Wilson, [1913] 2 K.B. 235, 242

[1914] 3 K.B. at p. 618

performance of the contract, and must be separate from and independent of it. Thus where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable by framing an action really arising out of contract as an action in tort for negligence; and an infant who has obtained a loan by falsely representing his age cannot be made to repay the amount of the loan in the form of damages in an action for fraudulent misrepresentation. Nor can an infant be made liable for goods sold and delivered by charging him in trover and conversion; for though by the Infants' Relief Act contracts for goods supplied to an infant are made absolutely void, yet the infant cannot be sued in this action since the delivery of the goods to him with intent to pass the property in them has vested the title in him.

But when an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable: for 'what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal'. In a rather similar case where an infant had borrowed goods and was unable to return them because he had lent them to a friend, the Court of Appeal has recently distinguished cases of this kind from those falling under the principle of *Jennings v. Rundall*.

The aid of equity has been invoked for the purpose of compelling an infant who has obtained property or money by fraud to make restitution. The remedy in such a case, it has been said, is not a remedy on the contract, but an equitable remedy for the fraud, and is therefore not affected by the Infants' Relief Act. It is, however, not so extensive as was at one time supposed, and has no application where the result would be to derogate from the rule that an infant cannot be made liable for what is in substance a contractual obligation by framing the action in tort. Its scope was considered in *Leslie v. Sheill*, where all

the earlier decisions are reviewed. 'I think,' said Lord Sumner, 'that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud. . . . Restitution stopped where repayment began.' The equitable remedy, therefore, is available to make an infant restore goods fraudulently obtained which are still in his possession, but not to make him repay a loan of money obtained by falsely representing his true age. This was the point at issue in *Leslie v. Sheill*. 'The money was paid over,' Lord Sumner pointed out, 'in order to be used as the defendant's own, and he has so used it and spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so.'

§ 3. Corporations

The limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some restrictions upon its contractual power (e.g. it cannot contract to marry), and the terms of its incorporation may impose others.

A corporation has an existence in law separate and distinct from that of the individuals who compose it;

1. Necessary limits to its contractual capacity

their corporate rights and liabilities are something apart from their individual rights and liabilities; they do not of themselves constitute the corporation, but are only its members for the time being.

Must con-
tract
through
an agent

Thus a corporation, having this ideal existence apart from its members, is impersonal, and must contract by means of an agent.

It follows also that a corporation must give some formal evidence of the assent of its members to any legal act which, as a corporation, it may perform. Hence the requirement that a corporation must contract under seal.

Anie, p 63

The exceptions to this requirement have been dealt with elsewhere. It may, however, be noticed here that where a corporation either expressly, or by the necessary construction of the terms of its incorporation, has power to make negotiable instruments, the Bills of Exchange Act, 1882, s. 91 (2), allows the corporate seal to take the place of signature. Before this Act a trading corporation whose business it might be to make such instruments could render them valid by the signature of an agent duly appointed, but the validity of a bill or note made under the seal of a corporation was doubtful.

Crouch v.
Credit
Foucier of
England
L.R. 8 Q B.
374

2. Express
limita-
tions

The express limitations upon the capacity of corporate bodies must vary in every case by the terms of their incorporation, but we cannot here discuss at any length the doctrine of *ultra vires*. The question whether the terms of incorporation are the measure of the contracting capacity of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed at length in the much litigated case of the *Ashbury Carriage Company v. Riche*; and the results of this and other cases point to a distinction between two kinds of corporations.

L R 7 H L.
653

A corporation created by charter in virtue of the royal prerogative can deal with its property, or bind itself by contract like an ordinary person, and even though the charter may impose limitations on its actions, these do not

impair its capacity. If they are exceeded, the effect is not to avoid the contract, but to give cause for a forfeiture of the charter by the appropriate procedure.

Baroness
Wenlock v.
River Dee
Co., 36 Ch D.
at p 685, n.

But a corporation created by or in pursuance of statute is limited to the exercise of such powers as are actually conferred, or may reasonably be deduced from the language of the statute. Thus a company incorporated under the Companies Act is bound by the terms of its memorandum of association to make no contracts inconsistent with, or foreign to, the objects set forth in the memorandum.

Osborne v.
Amalgamated Soc.
of Railway
Servants,
[1910] A.C.
87

Ashbury
Carriage
Co. v. Riche,
L.R. 7 H.L.
653

The Companies Act, 1929, enables such a company to alter its memorandum under certain conditions and for certain objects, e.g. the furtherance of its business, the addition of cognate business, or the abandonment of some of its original objects.

A contract made *ultra vires* is void; but not on the ground of illegality. Lord Cairns in the case last above cited takes exception to the use of the term 'illegality', pointing out that it is not the *object* of the contracting parties, but the *incapacity* of one of them, that avoids the contract.

Contracts
ultra vires
not void
for illegality, but
for incapacity

§ 4. Lunatic and drunken persons

The contract of a lunatic or drunken person is binding upon him unless it can be shown that at the time of making the contract he was wholly incapable of understanding what he was doing and that the other party knew of his condition.

The contract void-
able only if
known to
the other
party

'When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.'

Imperial
Loan Co. v.
Stone, [1892]
1 Q B 601

It does not seem to be certain whether this principle applies to a lunatic who has been found insane by inquisition directed under the Lunacy Act, 1890.

Matthews v.
Baxter, L.R.
8 Ex. 132

A person who makes a contract while in a state of intoxication known to the other party may subsequently avoid the contract, but if it is confirmed by him it is binding on him. A man, while drunk, agreed at an auction to make a purchase of houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and when sued on the contract pleaded that he was drunk at the time he made it. But the Court held that although he had once had an option in the matter and might have avoided the contract, he was now bound by his affirmation of it. 'I think,' said Martin, B., 'that a drunken man, when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it so as to bind himself to a performance of it.'

The rules of equity are in accordance with those of common law in this respect. Under such circumstances as we have described, Courts of Equity will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

Re J. 21 Cox
766
Re Rhodes
44 Ch.D. 94

By the Sale of Goods Act, 1892, s. 2, where necessities are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

§ 5. *Married Women*

Since the coming into force of the Law Reform (Married Women and Tortfeasors) Act, 1935, marriage does not affect the contractual or the proprietary capacity of a woman, and she may sue or be sued on her contracts, and judgments on them may be enforced against her, in all respects as if she were single.¹ Her husband cannot, by reason merely of being her husband, be made liable on her contracts, whether made before or during the marriage.

Infra, p. 388

¹ The enforcement of judgments in respect of contracts made, or debts or obligations incurred, before the passing of the Act (2nd August, 1935), is left to the operation of the old law.

But the Act contains a proviso which for some time to come will render necessary some acquaintance with the legal position of married women as it was before the Act took effect. This preserves in force 'any restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such a restriction, contained in any Act passed before the passing of this Act, or in any instrument executed before the 1st January, 1936'. After that date no restriction which could not have been attached to the enjoyment of property by a man can be created.

Until the 1st January, 1883, the contract of a married woman was, as a general rule, void. There were certain exceptions to this rule, of which the most important, and the only one which is now material, had arisen out of the equitable doctrine of a married woman's 'separate estate'. In equity property, real and personal, might be settled in trust for the separate use of a married woman independent of her husband, and in default of other trustees of such a settlement equity would compel the husband himself to act as trustee for his wife in respect of property so settled to which at common law he would have been entitled as her husband. Sometimes this property was settled on her with a 'restraint upon anticipation': in such a case she could use the income, but could neither touch the *corpus* of the property, nor create future rights over the income. But where it was not so restrained, then to the extent of the rights and interests created, a married woman was treated by Courts of Equity as having power to alienate and contract.

Johnson v.
Gallagher,
3 D.F. & J.
494

The Married Women's Property Act of 1870 specified various forms of property as the separate estate of married women, enabled them to sue for such property and gave them all remedies, civil and criminal, for its protection that an unmarried woman would have had under the circumstances.

Separate
estate by
Statute

Thus was constituted a new *legal* separate estate, not

vested in trustees, and in respect of which a married woman could sue apart from her husband.

s. 1 (1)

The Married Women's Property Act, 1882, extended this statutory separate estate to cover all the property of a married woman, whether held before, or acquired after the marriage. It enabled her to acquire, hold, and dispose of it by will or otherwise, 'as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee', and in 'respect of and to the extent of her separate property' she might enter into contracts, and render herself liable thereupon, as though she were a *feme sole*, and on such contracts she might sue and be sued alone.

s. 1 (2)

Scott v.
Morley,
20 Q B D
120

Restraint
on anti-
cipation

Statutes therefore had greatly extended the proprietary and contractual capacities of married women, but, until the Act of 1935, they had done this not by assimilating the position of a married woman to that of a single woman or of a man, but by developing the special position which Equity had created for her. Her property remained 'separate' property, and her contracts created a liability which could be enforced against this separate property, if she had any, but not otherwise. Further, the liability imposed by the Act of 1882 (and an amending Act of 1893) did not affect separate estate which a married woman was restrained from anticipating. Where property was settled upon a married woman subject to a restraint on anticipation, she could not make it liable in advance for the satisfaction of her contracts, for the latter Act expressly protected from such liability any property which *at the time of making the contract or thereafter* she was restrained from anticipating. This is still the law as regards restraints created before the 1st January, 1936, and we may note the following points about their manner of operation.

The restraint might be imposed on any kind of property and no particular form of words was needed to create it. It might be created before marriage, but it would not operate until marriage, and it would cease to operate if the

marriage came to an end by the death of the husband or by divorce, though it might revive on a second marriage. But the cessation of the restraint would not make the property to which it formerly applied available to satisfy a judgment on a contract made at a time when the restraint was operative.

Brown v.
Dumbleby,
[1904]
1 K B 28

When once the income of property which was subject to a restraint on anticipation had accrued due to a married woman, such income was free from the restraint, and she might deal with it as she chose; for in doing that she could not be said to 'anticipate' it. This was so even though the income might not have been actually paid over to her, but was still in the hands of her trustee. But the freeing of such income from the restraint did not make it available to satisfy a judgment on a contract which she had entered into at a time before the income accrued due, and when she was accordingly unable to anticipate it. To hold otherwise would have been to hold that at the time of making the contract she was able to anticipate the income. The crucial date therefore in determining what property of a married woman was available to satisfy a judgment on her contract was that of the contract and not that of the judgment.

Hood-Barrs
v. Heriot,
[1896] A C.
174

Wood v.
Lewis,
[1914]
3 K B. 73

The restraint might be removed by the Court, but only with the consent of the married woman and where it appeared to be for her benefit, under the Law of Property Act, 1925, s. 169; but 'a married woman cannot by hook or by crook—by any device, even by her own fraud, deprive herself of the protection which the restraint on anticipation throws around her'.

Bateman v.
Faber,
[1898] 1 Ch.
144, *per*
Lindley,
M. R.

CHAPTER V

Reality of Consent

THE next feature in the Formation of Contract which has to be considered is Genuineness or Reality of Consent; and here the same question recurs in various forms: Given an apparent Agreement, possessing the element of Form or Consideration, and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention?

This question may have to be answered in the affirmative for any one of the following reasons.

Mistake (i) The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to some essential element in the agreement. This is Mistake.

Misrepresentation (ii) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. This is Innocent Misrepresentation.

Fraud (iii) These untrue conclusions may have been induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving, or at least without any actual belief that they are true. This is Fraudulent Misrepresentation or Deceit.

Duress (iv) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence. This is Duress.

Undue influence (v) One of the parties may have been incapable in the circumstances of resisting the will of the other, so that his consent is no real expression of intention. This is Undue Influence.

Bell v. Lever Bros. Ltd.,
[1932] A.C.
per Lord Atkin, at
p. 217

The first of these defects affecting the consent of the parties differs radically from the others. 'If Mistake operates at all, it operates so as to negative or in some

cases to nullify consent.' It prevents the formation of a contract altogether. The other defects mentioned do not prevent a contract from coming into existence, except when a Misrepresentation, innocent or fraudulent, gives rise to mistake, as we shall see that it may do. Their consideration therefore will be reserved for succeeding chapters.

This chapter is concerned with that form of Mistake which invalidates a contract, and there are certain topics, superficially connected with the subject, which it will be well to eliminate at the outset. We are not here concerned with cases where the parties are genuinely agreed, though the terms employed in making their agreement do not convey their true meaning. In such cases they are permitted to explain, or the Courts are willing to correct their error; but this is Mistake of expression, and concerns the Interpretation, not the Formation, of Contract.

Nor are we concerned with cases in which there is not even the outward semblance of agreement, because offer and acceptance never coincided in their respective terms.

Nor, lastly, are we here concerned with cases in which a man finds the obligation of a contract more onerous than he intended, or is disappointed in the performance which he receives from the other party. If the terms of a contract do not express what one of the parties intended them to express, his failure to find words appropriate to his meaning is not Mistake.

The cases with which we have to deal fall into two main classes: they are cases in which the parties, though genuinely *ad idem*, have both contracted in the mistaken belief that some fact which lies at the root of the contract is true, and cases where, although to all outward appearance the parties are agreed, there is in fact no *consensus ad idem* between them, and the law therefore does not regard a contract as having come into existence.

(a) *Mistake as to the existence of a fact at the root
of the contract*

The clearest instance of this kind of mistake is afforded by mistake as to the existence of the thing contracted for.

Mistake
and im-
possibility

It has been doubted whether this is properly to be regarded as Mistake, or whether we should not say that the contract is avoided by the failure of an implied condition vital to the contract, namely, that the subject-matter of the contract is in existence.¹ The language of the Courts has been, however, in favour of treating these as cases of Mistake.

5 H.L.C. 673

In *Couturier v. Hastie*, a contract was made for the sale of a cargo of corn, which the parties supposed to be on its voyage from Salonica to England: it had in fact, before the date of sale, become so heated that it was unloaded at Tunis and sold for what it would fetch. The Court held that the contract was void, inasmuch as 'it plainly imports that there was something to be sold, and something to be purchased, whereas the object of the sale had ceased to exist'. Similarly, in a case in which part only of goods contracted for had perished the Court would not compel the buyer to take what remained, since that would have been to compel him to take something different from that which he had contracted to take.

Barrow,
Lane and
Ballard,
Ltd., v.
Phillips
Co., Ltd.
[1929] 1 K.B.
574

[1903] 2 Ch.
249

In *Scott v. Coulson*, a contract for the assignment of a policy of life insurance was made upon the basis of a belief common to both parties that the assured was alive. He had, in fact, died before the contract was made. It was held that 'there was a common mistake, and therefore the contract was one that cannot be enforced'.

Mistake as
to exist-
ence of a
right

The same principle has been applied in a case where *A* agreed to take a lease from *X* of a fishery of which, contrary to the belief of both parties at the time, *A* was already tenant for life. The decision that the contract was void does not, as might at first sight appear, infringe the maxim

¹ By s. 6 of the Sale of Goods Act such a condition is implied in every sale of goods.

ignorantia juris haud excusat, for 'In that maxim,' said Lord Westbury, 'the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact.'

Cooper v.
Phibbs,
L.R. 2 H.L.
170

In the illustrations so far considered it is not difficult to see that the agreement of the parties does not result in a binding contract. If a cargo does not exist, it cannot be transferred; if a man is dead, his life is no longer insured; if property belongs to *X*, *Y* cannot convey it to him. In the absence of some clear indication that one of the parties intends to insure the other against the risk that the matter about which they are contracting is not in existence, it is to be presumed that they did not intend to contract about a non-existent subject-matter. We may note that marine insurance policies usually contain the words 'lost or not lost' in order to protect the assured against this form of mistake.

But the question becomes more difficult when we pass to cases in which the mistake relates, not to the very existence of the thing contracted for, but to some quality which it was believed to, but does not in fact, possess, and where, accordingly, it cannot be said to be impossible, either physically or legally, for the terms on which the parties have agreed to be carried out. 'The difficulty,' it has been said by Blackburn, J., 'in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.' But in the application of this distinction the attitude of English law has hitherto been somewhat uncertain.

Kennedy v.
Panama
Steam Co.,
L.R. 2 Q.B.
at p. 588

It is clear, in the first place, that a mistake as to the *quality* of the thing contracted for will have no effect if it is not the mistake of *both* parties. In *Smith v. Hughes*, Hughes

L.R. 6 Q.B.
597

was sued for the price of oats sold and delivered, and for damages for not accepting oats bargained and sold. The facts as assumed by the Court were that the defendant believed the oats to be *old* oats, that the plaintiff was aware of the existence of that belief, but that he did nothing to bring it about, simply offering his oats and exhibiting his sample, and remaining perfectly passive as to what was passing in the mind of the other party. The Court was of opinion that on these facts the buyer would not be entitled to avoid the contract. Whether it accords with ordinary decent feeling that the law should tolerate the passive acquiescence of the seller in the self-deception of the buyer in a case of this kind is another matter.

Cf. Lord
Wright, in
L Q R 1943,
p. 127

Dealing with the argument that the parties were not *ad idem* because the defendant intended to buy old oats and the plaintiff to sell new, Cockburn, C. J., said:

‘This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract.’

But would the result have been different if *both* parties, while agreed as to the sale and purchase of a particular parcel of oats, had believed the oats to be old when in fact they were new? If the contract is not avoided when *A* knows of *B*’s mistake, though he does not share it, it is not easy to see why it should be avoided merely because he does share it. This in effect was the question which arose in *Bell v. Lever Bros.*, and which, it is submitted, was there answered in the negative.

[1932] A.C.
161

The plaintiffs (Lever Bros.) sought to set aside, and to recover moneys paid under, an agreement whereby they had paid large sums by way of compensation to the defendants, Bell and Snelling, in consideration of their retiring from the Board of the Niger Company (a subsidiary

of Levers). After this compensation had been paid, the plaintiffs discovered that the defendants, while members of the Board, had been guilty of breaches of duty for which their agreements of service might have been summarily determined and they themselves dismissed without notice or compensation. The jury negatived an allegation of fraudulent concealment by the defendants, but it was held that the compensation agreement ought to be set aside and the money repaid, (1) by Wright, J., and by the Court of Appeal, on the ground of mutual mistake, both parties having believed, contrary to the truth, that the service agreements of the defendants could not be terminated without their consent; and, (2) by the Court of Appeal, also on the ground of the failure of the defendants to disclose their past breaches of duty. From this decision the defendants appealed, and by a majority of three to two the House of Lords reversed it.¹

The case is, of course, a final and binding authority for whatever it decides, but there has been some discussion as to what this is. One member of the majority in the House, Lord Blanesburgh, based his decision on a point of pleading, but he also stated that he was in accord with the other majority opinions, those of Lords Atkin and Thankerton. Lord Atkin thought that 'in such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be'. But, he said, in the present case 'the contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain.'

¹ The second ground relied upon by the Court of Appeal was rejected by the majority in the House on the ground that, the contract not being within the exceptional class of contracts *uberrimae fidei* (*v. infra*, p. 178), the defendants were under no duty to disclose their own faults. The minority did not expressly dissent from this view.

On this view the test of an operative mutual mistake turns upon the identity or otherwise of the subject-matter about which the parties believed themselves to be contracting with the subject-matter as it is when the true facts are known.

Lord Thankerton also repudiated an argument, on which stress was laid in the judgments of the Courts below and of the minority in the House, that if Levers had known the true facts they would never have entered into the compensation agreement. 'It is not enough,' he said, 'for the purchaser to prove that the misapprehension was the inducing cause to him, and that if he had known, he would not have entered into the contract.' It must relate, he thought, to 'something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter', and he found it difficult to believe that Bell and Snelling regarded the supposed indefeasibility of their service agreements as such an element. In insisting upon this distinction between a *motive* operating on the mind of *one* of the parties and an assumption which they *both* regard as essential, Lord Thankerton was but reaffirming the distinction made by Blackburn, J., and Cockburn, C. J., in the judgments which have been already referred to; 'if there be misapprehension as to the substance of the thing,' said the former, 'there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding'; and Cockburn, C. J.'s reference in *Smith v. Hughes* to the 'fallacy' of confounding the motive of one party with an 'essential condition' of the contract has been already quoted.

The illustrations of operative mutual mistake which Lord Thankerton gives are those which have been given at the beginning of this section, and they are all cases in which the effect of the mistake was to destroy the identity of the subject-matter; it is not easy to imagine other cases

Ante, pp.
147-8
Kennedy v.
Panama
Steam Co.,
ibid at
p. 588

which would, on Lord Thankerton's reasoning, fall under the doctrine of mutual mistake. It is submitted therefore that the opinions of the majority of the House, though differently expressed—Lord Atkin's test, the identity of the subject-matter, is objective, and Lord Thankerton's, something which both parties accept as an essential element of the subject-matter, is subjective—lead to the same conclusion; and that *Bell v. Lever Bros.* must be accepted as a decision limiting the application of the doctrine of operative mutual mistake almost, if not altogether, to cases, such as those which have been cited, where the mistake relates to the actual existence of the subject-matter of the contract. Such a conclusion means that English law does not accept a doctrine of *error in substantia* as distinct from one of *error in corpore*.

(b) *Absence of consensus ad idem*

This class of contract presents considerable difficulties; and it will be convenient to state what are conceived to be the general principles governing this branch of the law, and then to test them by reference to the best known varieties of such contracts.

It follows from the essential nature of a contract that if there is no true agreement between the parties, or, as is commonly said, if the parties are not *ad idem*, there is no contract. This we may call principle No. 1.

This is only another way of saying that offer and acceptance must correspond exactly, or no contract will ensue. Therefore, if the offeree thinks that the offeror is some person other than he really is, or that the thing offered is something different, or that the terms proposed by the offeror are other than those actually proposed, and if he accepts on that mistaken assumption, it is clear that there is no true *consensus ad idem*; for the offer which he has accepted is not the offer made by the other party.

But he may nevertheless be held to have accepted the real offer, and not that which exists merely in his imagina-

tion ; for it is a principle, which we will call principle No. 2, that, if a person so conducts himself that a reasonable man would suppose that he was assenting to a bargain proposed by another person, and that other person was himself under the impression that he did so assent, in such a case the law will treat him as though he had actually assented to the bargain as proposed. He is said to be estopped by his conduct from denying that he has so assented.

It is evident that in the vast majority of cases the operation of principle No. 1 will be excluded by principle No. 2, so that we should be justified in enunciating the working rule that the cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed.

Nevertheless it may occasionally happen that the law regards a contract as void though at first sight it appears perfectly valid. This may be for one of two reasons.

(1) The terms in which the contract is expressed may suffer from such latent ambiguity that it is impossible to say that the conduct of the parties points to one solution rather than another. In such a case one party may say that he did not attach the same meaning to the terms as the other party, and it will be impossible to say that his conduct would have induced a reasonable man to make one deduction rather than the other.

(2) Or it may happen that, although the conduct of one party is such that a reasonable man would assume that he was assenting to the offer of the other party, yet that other party knows that he does not really so assent. In such a case he will not be estopped as against that other party from denying the fact of agreement. For an estoppel never operates in favour of a person who is aware of the true facts.

Raffles v
 Wichelhaus,
 2 H. & C. 906
 Scriven v.
 Hindley,
 [1913] 3 K B
 564

Cundy v.
 Lindsay,
 3 App. Cas
 459

We shall find instances of both these varieties of operative mistake in the course of the following pages.

The occasions of operative mistake which are most often encountered in practice are the following:

(i) Mistake as to the identity of the person with whom the contract is made.

(ii) Mistake as to the identity of the subject-matter.

(iii) Mistake by one party as to the promise of the other, known to that other.

(i) *Mistake as to the identity of the person with whom the contract is made*¹

Mistake of this sort can only occur where *A* contracts with *X*, believing him to be *M*: that is, where the offeror has in contemplation a definite person with whom he intends to contract. One who makes a general offer which anyone may accept, such as an offer by advertisement, cannot say that he was mistaken as to the identity of an acceptor.

Mistake as to party

We may start with the proposition that a person cannot constitute himself a contracting party with one who he knows or ought to know has no intention of contracting with him. An offer can be accepted only by the person to whom it is addressed.

In *Boulton v. Jones* Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst, which Boulton supplied without informing him that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and it was held that he need not. 'It is a rule of law', said Pollock, C. B., 'that if a person intends to contract with *A*, *B* cannot give himself any right under it. Here the order in writing was

2 H & N
564

¹ In revising this section I am indebted to an article, 'Mistake as to identity in the Law of Contract', by Professor A. L. Goodhart in L.Q.R., vol. 57, p. 228. [J.L.B.]

given to Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price. But since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him.'

3 App Cas. 459 So too no contract will be formed if the person accepting an offer believes on reasonable grounds that he is accepting an offer from someone other than the person by whom it has in fact been made. In *Cundy v. Lindsay* a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, and writing from an address in the same street, fraudulently induced Lindsay to send goods to his address, which he afterwards sold to an innocent purchaser, Cundy. It was held that Blenkarn could pass no title to the goods to Cundy because as between Blenkarn and Lindsay there was no contract. 'Of him', said Lord Cairns, 'they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.'

[1920]
3 K.B. 497

Said v. Butt is another case which illustrates the principle that a person cannot constitute himself a contracting party with another whom he knows to have no intention of contracting with him. The plaintiff wished to attend the first-night performance of a certain play, but he knew that if he himself applied at the box office for a ticket it would be refused him for personal reasons. He therefore got a friend to buy a ticket without disclosing that he was buying it for him, the plaintiff. It was held that no contract between the plaintiff and the defendants had come into existence; the plaintiff could not constitute himself a contractor with the defendants without their knowledge and contrary to their express refusal.

So far we have been dealing with cases where no contract is formed because one of the parties never in fact intended to make a contract with the other. But if *A*'s mistake does not go to the *identity* of the other party, if he does intend to make a contract with that particular person, then the fact that he would not have made it if he had not been labouring under some mistake regarding the personality of the other party will not prevent the formation of a contract. In *King's Norton Metal Co. v. Edridge*, goods 14 T.L.R. 98 were ordered from the plaintiff company by a fraudulent person, Wallis, in the name of 'Hallam & Co.', a firm which did not exist, but which was represented on the note-paper which he used as being a firm in a large way of business. The Court of Appeal held that the company had intended to contract with the writer of the letter; no doubt they would not have done so if they had known what sort of person the writer was, but a contract had been made which was not void on the ground of mistake, but only voidable on the ground of fraud. Consequently the property in the goods delivered had passed under it to Wallis, and an innocent purchaser from him had acquired a good title to them. The facts were superficially similar to those of *Cundy v. Lindsay*, but with this vital distinction: that in *Cundy v. Lindsay* the party deceived did not, whereas in *King's Norton Metal Co. v. Edridge* he did, intend to contract with the party who had sent the order for the goods. 'If it could have been shown', said A. L. Smith, L. J., in the latter case, 'that there was a separate entity called Hallam & Co. and another entity called Wallis, then the case might have come within the decision in *Cundy v. Lindsay*.'

King's Norton Metal Co. v. Edridge does not seem to have been cited to the Court in the recent case of *Sowler v. Potter*, and it is not easy to reconcile the decision of Tucker, J., in that case with the decision of the Court of Appeal in the earlier case. The defendant had at an earlier date been convicted in the name of Ann Robinson of allowing [1940]
1 K.B. 271

disorderly conduct in a café; she had subsequently assumed the name of Potter, and the plaintiff had granted her a lease of certain premises under that name. The plaintiff knew of the record of Ann Robinson, and she would not have granted the lease to Potter if she had known that Potter and Robinson were the same person. In these circumstances the Court held that the lease was void. 'This case of landlord and tenant', said the learned judge, 'is clearly one where the consideration of the person with whom the contract was made was a vital element in the contract, and therefore, if there was any mistake on the part of the plaintiff with regard to the identity of the person with whom she was contracting, the contract is void *ab initio*.'

In deciding the case on this ground the learned judge applied a passage from the work of a great French jurist of the eighteenth century, Pothier. According to Pothier, error with regard to the person with whom a contract is made will annul a contract 'whenever the consideration of the person with whom I am willing to contract enters as an element into the contract'; but it will not have this effect when 'I should have been equally willing to make the contract with any person whatever'. This passage has been more than once cited with approval in English cases, but it is believed that this is the first occasion on which it has been made the basis of a decision, and it is submitted that it does not represent the English law on the matter to which it relates. It seems to imply that a person may find himself in contract with another with whom he never intended to contract because, in the opinion of the Court, it does not matter to him with whom the contract is made, and conversely that even though he may have intended to contract with a particular person, yet there will be no contract if he was mistaken as to some fact about that person and would not have been willing to make the contract if he had not been so mistaken. It is believed, however, that in our law this is not the test of an operative

Smith v.
Wheatcroft,
9 Ch. D. at
p. 230
Lake v. Sim-
mons, [1927]
A.C. at p. 501

mistake regarding the person with whom a contract is being made, and that the true test is to ask whether the party seeking to avoid the contract did or did not intend, or has so conducted himself that he must be taken to have intended, to contract with that other particular person. Thus in *Boulton v. Jones* there was no contract because Jones never intended to contract with Boulton, and in *Cundy v. Lindsay* there was no contract because Lindsay never intended to contract with Blenkarn ; whereas in *King's Norton Metal Co. v. Edridge* there was a contract because the company did intend to contract with the person who had written the letter ordering the goods.

Perhaps the case in which this question is most difficult to resolve is that in which the transaction takes place not, as in the cases which we have so far considered, between parties at a distance from one another, but *inter praesentes*. In *Phillips v. Brooks* a man, North, called in person at the plaintiff's shop and bought goods, of which he obtained delivery by means of a worthless cheque, representing himself to be Sir George Bullough, a person of credit whose name was well known to the plaintiff. He sold the goods to the defendant, who had no notice of the fraud. The plaintiff sued the defendant for the return of the goods, alleging that in the circumstances he had never parted with the property in them. Judgment was given for the defendant, and the judge, Horridge, J., cited with approval an American case in which Morton, C. J., said :

[1919]
2 K B 243

Edmunds v
Merchant
Despatch
Co., 135
Mass 283

'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and term of payment, the person selling and the person buying. . . . He [the plaintiff] could not have supposed that he was selling to any other person ; his intention was to sell to the person present and identified by sight and hearing ; it does not affect the sale because the buyer assumed a false name and practised any other deceit to induce the vendor to sell.'

This reasoning would apparently oblige us to say that there can be no operative mistake as to identity *inter praesentes*. But that would be a startling conclusion, and it is

difficult not to believe that in *Phillips v. Brooks* the shopkeeper never intended to contract with North, but with Sir George Bullough and no one else, that North knew this perfectly well, and that accordingly no contract between North and the shopkeeper was ever formed.¹ That a mistake as to identity *inter praesentes* can be an operative mistake preventing the formation of a contract seems to be established by an earlier case in which goods were ordered personally by, and delivered to, a person who professed to represent a firm with which the plaintiffs thought they were contracting. It was held that there was no contract.

Hardman v.
Booth, 1 H.
& C. 803

Cases of
mutual
mistake

2 H. & N.
564

The reports do not furnish us with any case of genuine mutual mistake in which *A* makes an offer to *B* believing him to be *C*, and *C* accepts believing the offer to be meant for him. But if, in *Boulton v. Jones*, the plaintiff had succeeded a predecessor in business of the same name, he might reasonably have supposed that the order for the goods was meant for him. If the order had been given to Boulton *B* and accepted by Boulton *C*, it is doubtful whether Jones could have avoided the contract on the ground that, though he obtained the goods he wanted from the man to whom his order was addressed, the Boulton whom he addressed was not the Boulton whom he intended to address. The case would of course be different if there were circumstances indicating to the person receiving the offer that it was intended for a different person.

(ii) *Mistake as to the identity of the subject-matter*

Mistake of
identity of
subject-
matter

Lake v.
Simmons,
[1927] A C.
at p. 501

A contract may be void on the ground of Mistake, if two

¹ It has been suggested by Viscount Haldane that the decision in *Phillips v. Brooks* may have been right on the facts for another reason. The fraudulent representation appears to have been made *after* the parties had agreed upon the sale, i.e. after the contract was made and the property in the goods had passed to North. It induced, therefore, not the making of the contract, but only the delivery of the goods, which, by the Sale of Goods Act, 1893, s. 18, is independent of the passing of the property. There is, however, nothing in the judgment of Horridge, J., to suggest that he intended to base his decision on this ground.

things have the same name, and *A* makes an offer to *X* referring to one of them, which offer *X* accepts, thinking that *A* is referring to the other. If there is nothing in the terms of the contract to identify one or other as its subject-matter, evidence may be given to show that the mind of each party was directed to a different object: that *A* offered one thing, and *X* accepted another.

In *Raffles v. Wichelhaus* the defendant agreed to buy of the plaintiff a cargo of cotton 'to arrive *ex Peerless* from Bombay'. There were two ships called *Peerless*, and both sailed from Bombay, but *Wichelhaus* meant a *Peerless* which arrived in October, and *Raffles* meant a *Peerless* which arrived in December. It was held that there was no contract. But if *Wichelhaus* had meant a ship of a different name, he would have had to take the consequences of his carelessness in not expressing his meaning properly. Nor could he have avoided the contract if its terms had contained such a description of the subject-matter as would practically identify it.

2 H. & C.
906

*Ionides v.
Pacific In-
surance Co.,
1. K. 6 Q. B.
686*

(iii) *Mistake by one party as to the promise of the other,
known to that other*

We come here to the limits of operative Mistake in regard to the subject-matter of a contract, and must be careful to define them so as to avoid confusion.

A general rule laid down in *Freeman v. Cooke*, and often cited with approval, may be taken to govern all cases in which one of two parties claims to repudiate a contract on the ground that his meaning was misunderstood, or that he misunderstood that of the other party.

2 Exch 654

'If whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'

*Smith v.
Hughes,
1. K. 6 Q. B.
at p 607*

In entering into a contract a man must use his own judgment, or if he cannot rely upon his judgment, must

Responsi-
bilities of
parties

take care that the terms of the contract secure to him what he wants. 'Caveat emptor' is a general rule of the law of contracts.

In two classes of cases, however, the law mitigates the rigour of this rule.

Statutory
implied
condi-
tions

Infra, p. 332

Where goods are bought by description, or in reliance on the judgment of a seller who knows the purpose for which they are required, the Sale of Goods Act, 1893, s. 14, introduces into the contract implied conditions that the goods supplied shall be of a merchantable quality, or reasonably fit for the purpose for which they are required. And where the sale is by sample, there are, under s. 15, implied conditions that the bulk shall correspond with the sample, that the buyer shall have an opportunity for inspection, and that there shall be no defect not apparent on reasonable examination which would render the goods unmerchantable.

Rule of
non-dis-
closure

Infra, p. 178

And again, in certain contracts said to be *uberrimae fidei*, in which one of the two parties is necessarily at a disadvantage as to knowledge of the subject-matter of the contract, the other is bound to disclose every material fact, that is, every fact which might have influenced the mind of a prudent person.

Beyond this, where the terms of a contract are clear, the question is, not what the parties *thought*, but what they *said* and *did*. Subject to the exceptions already mentioned, a contracting party must take care of himself: he cannot expect the other party to correct his judgment as to the matter of his bargain, or ascertain by cross-examination whether he understands its terms.

But the law will not recognize that a contract has come into existence when a man makes or accepts an offer, which he *knows* that the other party understands in a materially different sense from that in which he makes or accepts it himself.

Illustra-
tions

We can best illustrate these propositions by an imaginary sale.

A sells *X* a piece of china.

(α) *X* thinks it is Dresden china, *A* thinks it is not. Each takes his chance. *X* may get a better thing than *A* intended to sell, or a worse thing than he himself intended to buy; in neither case is the validity of the contract affected.

Mistake as to thing

(β) *X* thinks it is Dresden china. *A* knows that *X* thinks so, and knows that it is not.

The contract holds. *A* must do nothing to deceive *X*, but he is not bound to prevent *X* from deceiving himself as to the *quality* of the article sold.

(γ) *X* thinks that it is Dresden china and thinks that *A* intends to contract to sell it as Dresden china; and *A* knows it is not Dresden china, but does not know that *X* thinks that he is contracting to sell it as Dresden china. The contract says nothing of Dresden, but is for a sale of china in general terms.

Mistake as to offer

The contract holds. The misapprehension by *X* of the extent of *A*'s offer, *if unknown to A*, has no effect. It is not *A*'s fault that *X* omitted to introduce terms which he wished to form part of the contract.

(δ) *X* thinks it is Dresden china, and thinks that *A* intends to contract to sell it as Dresden china. *A* knows that *X* thinks he is contracting to sell it as Dresden china, but does not mean to, and in fact does not, offer more than china in general terms.

Smith v Hughes,
L R 6 Q B
at p 610,
per
Hannan, J.

The contract is void. *X*'s error was not one of judgment as to the quality of the china, as in (β), but was an error as to the nature of *A*'s offer, and *A*, knowing that his offer was misunderstood, nevertheless allowed the mistake to continue. Since *A* intends to offer one thing, and *X* to accept an offer of a materially different thing, there is no *consensus ad idem*; and since *A* is aware of this, *X* is not estopped from denying the reality of his apparent consent.

London
Holeproof
Hosiery Co
v Padmore
44 L R,
499

In *Scriven v. Hindley* the plaintiffs instructed an auctioneer to sell certain bales of hemp and tow, which were described in the catalogue as so many bales in different lots with no indication of the difference in their contents. The

[1913]
3 K B 564

defendant examined samples of the hemp before the sale, intending to bid for the hemp alone. The tow was put up for sale, and the defendant made a bid which was accepted. The bid was a reasonable one if it had been for hemp, but an excessive one for tow. The jury found that the auctioneer intended to sell tow and that the defendant intended to bid for hemp, and that the auctioneer believed that the bid was made under a mistaken idea of the value of tow.

On these findings it is clear that the parties were not *ad idem* in fact, and there could therefore be no contract unless the defendant was estopped by his conduct from asserting that he had intended to bid for hemp. The defendant could not bring the case under the principle of case (8) above, for the auctioneer did not know that the defendant thought hemp was being offered; he merely thought that the defendant was making an extravagant bid for tow, and to such a mistake the maxim *caveat emptor* would clearly have applied. The defendant therefore would have been estopped but for another circumstance in the case, viz., the misleading form of the catalogue, which had contributed to his mistake. On that ground judgment was entered for the defendant.

A series of Equity cases illustrates the rule that when one man knows that another understands his offer in a different sense from that in which he makes it the transaction will not be allowed to stand.

30 Beav. 62 In *Webster v. Cecil* specific performance of a contract was refused on the ground of Mistake of this nature. The parties were in treaty for the purchase of some plots of land belonging to Cecil. Webster, through his agent, offered £2,000, which was refused. Afterwards Cecil wrote to Webster a letter containing an offer to sell at £1,200; he had intended to write £2,100, but either cast up the figures wrongly or committed a clerical error. Webster accepted by return of post. Cecil at once tried to correct the error, but Webster, though he must have known from the first

that the offer was made in mistaken terms, claimed that the contract should be performed and sued for specific performance. This was refused: the plaintiff was left to such action at law as he might be advised to bring. The case was described later as one 'where a person snapped at an offer which he must have perfectly well known to be made by Mistake'.

Per James, L. J., Tamplin v. James, 15 Ch. D. 221

A and *X* signed a memorandum of agreement by which *A* promised to let certain premises to *X* 'at the rent of £230, in all respects on the terms of the within lease': and this memorandum accompanied a draft of the lease referred to. *A*, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed with this error. In this suit *A* sought to have the mistake rectified. The Court was satisfied, upon the evidence, that *X* was aware that *A* believed her to be promising to pay a rent higher than that which she was actually promising, and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or of giving it up, and paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed. *Harris v. Pepperell* and *Paget v. Marshall* were other cases in which the defendant accepted an offer which he must have known to express something which the offeror did not intend to express, and in which he was offered the alternative of cancellation or rectification.

Garrard v. Frankel, 30 Beav. 445

Infra, p. 299

L.R. 5 Eq. 128 Ch. D. 255

It will be seen that in *Webster v. Cecil* the Court refused the equitable remedy of specific performance, leaving open the question whether or not in the circumstances a contract existed for the breach of which damages might have been obtained in a court of law. In the three cases last mentioned the Court went further, and was prepared to cancel the contracts altogether unless the defendant was willing to accept the offer in the form in which, as he must have known, the offeror had intended to make it. But until recently there seems to have been no case in which the

Court has had to decide whether damages can be obtained for breach of a contract arising from the acceptance of an offer which the plaintiff could not reasonably suppose to have expressed the offeror's real intention. In *Hartog v. Colin and Shields*, an action for damages for breach of a contract for the sale of goods, Singleton, J., dismissed the action on this ground.

[1939]
3 All E R.
566

**Mistake in
written
contracts**

So far it has not been difficult to trace the operation of coherent principles in our law of mistake. We have now, however, to deal with a source of difficulty which is peculiar to the law of written contracts. This is due to the existence of the old Common Law defence of *non est factum*,¹ which permits one who has executed a written document in ignorance of its character to plead that, notwithstanding the execution, 'it is not his deed' in contemplation of law.

[1907] 1 Ch.
537, [1908]
1 Ch. 1

In *Howatson v. Webb* one Hooper had fraudulently induced the defendant to execute a mortgage deed which acknowledged that the defendant was indebted to one Whitaker, the mortgagee, in the sum of £1,000. The defendant knew that the deed transferred certain property vested in him, but was unaware either that it was a mortgage, or that it contained a promise on his part to pay a sum of money to Whitaker. Whitaker assigned the mortgage, including the debt, to the plaintiff, who had no knowledge of the fraud and assumed that the deed was valid. It was held that the defendant was estopped from denying the validity of the deed.

In *Howatson v. Webb* the defence of *non est factum* was set up and failed, on the ground that it would not apply where a person was mistaken merely as regards the contents, and not the essential nature of the contract. The plea failed also in *Blay v. Pollard*, where the defendant had signed a document which he knew to relate to a dissolution of a partnership of which he was a member, but to one of

[1930] 1 K B
628

¹ The term properly applies to a deed, but 'the principle is equally applicable to other written contracts'; *Per* Byles, J., in *Foster v. Mackinnon*, L.R. 4 C.P. at p. 712.

the terms of which he objected as not carrying out a previous oral agreement. Where, however, a party is induced by his mistake to execute a written contract of a character entirely different from that which he intends to sign, the defence of *non est factum* is available; the contract is entirely void, into whosoever hands it may come.

The only cases furnished in the reports are cases in which by the fraud of a third party the promisor has been mistaken as to the nature of the contract into which he was entering, and the promisee has in consequence been led to believe in the intention of the other party to contract when he did not so intend. In *Thororoughgood's Case*,^{2 Co Rep 9} an illiterate man executed a deed, which was described to him as a release of arrears of rent: in fact it was a release of all claims. The deed was not read to him, but when told that it related to arrears of rent, he said, 'If it be no otherwise, I am content', and executed the deed. It was held that the deed was void.

Non est
factum

In *Foster v. Mackinnon*, Mackinnon, 'a gentleman far advanced in years', was induced to endorse a bill of exchange for £3,000, on the assurance that it was a guarantee. Later the bill was endorsed for value to Foster, who sued Mackinnon; the jury found that there was no negligence on the part of Mackinnon, and though Foster was innocent of the fraud, it was held that he could not recover.

'It seems plain on principle and on authority that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

Foster v.
Mackinnon,
L.R. 4 C P.
711

Lewis v. Clay was decided on the same grounds. Lewis was the payee of a promissory note made jointly by Clay

67 L J Q B.
224

and Lord William Nevill. Clay had been induced to sign his name on a piece of paper, concealed from him by blotting-paper with the exception of the space for his signature. He was told by Nevill that the document concerned private affairs, and that his signature was wanted as a witness. The jury found that he had signed in misplaced confidence, but without negligence: and Lord Russell, C. J., held that he was not liable because 'his mind never went with the transaction', but was 'fraudulently directed into another channel by the statement that he was merely witnessing a deed or other document'.

It will be observed that in none of these three cases had the party deceived contributed to his deception by his own negligence. They therefore left open the question whether the plea of *non est factum* would avail one who is in fact deceived as to the character of the document which he executes, but who is negligent in not informing himself of it.

In *Howatson v. Webb* the Court of Appeal expressed a doubt whether at the present day a person, neither illiterate nor blind, would not be estopped from availing himself of the plea of *non est factum* against one who innocently acts on the faith of a deed being valid. Certainly it might be thought reasonable that if one of two innocent parties in such a case is to suffer for the fraud of a third, the sufferer should be the one whose negligence has contributed to the loss sustained. This, however, is not the view which the Court of Appeal subsequently took in the case of *Carlisle Banking Co. v. Bragg*.

[1911] 1 K.B.
489

Rigg asked Bragg to sign a document, telling him that it referred to some insurance matter about which they had already been doing business together. Bragg signed without reading it, and it turned out to be a guarantee of Rigg's account with the plaintiff Bank. The Bank allowed Rigg to overdraw on the faith of Bragg's supposed guarantee. The jury found that Bragg had been induced to sign the guarantee by the fraud of Rigg, that he did not know it was a guarantee, but that he was negligent in signing it.

On these findings the Court of Appeal held that Bragg was not liable on the guarantee, his negligence being immaterial since he owed no duty to the plaintiffs.

The Court distinguished the case of *Foster v. Mackinnon* on the ground that negotiable instruments are exceptions to this rule, for the maker, acceptor, or indorser of a negotiable instrument owes a duty to every subsequent bona fide holder for value, and is liable on the instrument unless he can show not merely that his mind did not go with his signature, but that no negligence on his part contributed to his mistake.

It is not easy to regard the state of the law on mistake in written contracts as satisfactory. It contains two distinctions which are difficult to justify. In the first place we have the distinction between mistake as to the essential nature or character of the document and mistake as to its contents; in the former the plea of *non est factum* is admitted and the apparent contract is void however negligent the person signing the document may have been, whereas in the latter the plea is not admitted, and the person signing may be estopped from denying his signature. The distinction between character and contents is perhaps intelligible in the abstract, but in practice it leads to different decisions in cases which common sense seems to suggest ought to be governed by the same rule. In *Howatson v. Webb*, Webb had no thought of mortgaging property or incurring a debt; in *Carlisle Banking Co. v. Bragg*, Bragg had similarly no thought of giving a guarantee, yet because Webb knew that the document related to the property to which it actually did relate (though he thought it dealt with that property in a way totally different from that in which it did deal with it), whereas Bragg thought that his document related to something quite different from a guarantee, Webb was bound and Bragg was not.

Secondly, in those cases where the mistake relates to the whole character of the document and the plea of *non est*

factum is therefore *prima facie* admitted, we have the distinction between negotiable instruments and other documents, on the ground that a duty is owing to persons into whose hands a negotiable instrument (but not any other document) may come.

But *non est factum* means that in the eye of the law a man has not executed a document to which as a physical fact he has affixed his signature, and it is difficult to see how a man can be under any duty to persons into whose hands a document, which *ex hypothesi* is not his act, may come, or how it can make any difference in this respect whether such a document purports to be a negotiable instrument or something else. It seems unfortunate that the plea of *non est factum* has not been restricted to the case of persons who are blind or illiterate as was suggested by the Court in *Howatson v. Webb*; and that the rule that negligence excludes a plea of *non est factum* in the case of negotiable instruments has not been extended to all written contracts, as indeed was supposed to be the law before the decision in *Carlisle Banking Co. v. Bragg*.

Effect of Mistake

Effect of
Mistake

Where Mistake, within the limits that we have described, affects the formation of a contract, no true contract comes into existence; it is void *ab initio*. The Common Law therefore offers two remedies to a person who has entered into an agreement void on the ground of Mistake. If it be still executory he may repudiate it and successfully defend an action brought upon it; or if he have paid money under the contract, he may recover it back. In equity the victim of Mistake may resist specific performance of the contract, or he may apply as plaintiff to the Chancery Division of the High Court to get the contract set aside and to be freed from his liabilities in respect of it, and in some cases, as we have seen, he may be offered the alternative of rectification or cancellation.

Webster v.
Cecil, 30
Beav. 62
Paget v
Marshall, 28
Ch. D. 255

CHAPTER VI

Misrepresentation

IN dealing with Misrepresentation as a circumstance invalidating a contract we must note, by way of introduction, that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself, in the form of an undertaking or warranty that certain things *are*; just as he may promise that certain things *shall be*. In either case the undertaking or promise is a term of the contract. On the other hand, he may make, during the preliminary bargaining, statements of fact, intended by neither party to be terms of the subsequent contract, but which, nevertheless, may seriously affect the inclination of one party to enter into it.

State-
ments
which are
terms in a
contract

and state-
ments
which are
not

Representation, therefore, may introduce terms into a contract and affect *performance*: or it may induce a contract and so affect the intention of one of the parties, and the *formation* of the contract.

(1) *The Law before and since the Judicature Act*

At Common Law, a representation (save in certain excepted cases) had no effect on a contract unless it was either (1) fraudulent, or (2) had become a term in the contract. The precise meaning of 'fraudulent' we shall consider later; but if a representation was fraudulent, the party misled might not only rescind the contract, but he might also bring an action in tort for Deceit. If the representation had become a term in the contract, it might be one of two things: (1) it might be regarded by the parties as a vital term going to the root of the contract (when it is usually called a Condition); and in this case its untruth entitles the injured party to repudiate the whole contract; or (2) it might be a term in the nature only of an independent subsidiary promise (when it is usually called a Warranty), which is indeed a part of the contract, but does not

Representations at
Common
Law

Kennedy v.
Panama
Steam Co.,
L.R. 2 Q.B.
580

Condition

Warranty

go to the root of it; in this case its untruth only gives rise to an action *ex contractu* for damages, and does not entitle the injured party to repudiate the whole contract.

A matter
of con-
struction

Infra, p. 326

Whether a term is to be regarded as a Condition or a Warranty is a matter of construction for the Court to determine; and to this distinction we shall return in a later chapter. But we may note here that this distinction between a condition and a warranty is not always observed, especially in the older cases, and that 'warranty' is often used to denote what is here defined as a 'condition'.

The Common Law rules on the subject of conditions, warranties, and representations may be illustrated from the judgment in the case of *Behn v. Burness*.

3 B. & S.
751

In that case action was brought upon a charter party dated the 19th day of Oct. 1860, in which it was agreed that Behn's ship 'now in the port of Amsterdam' should proceed to Newport and there load a cargo of coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport, Burness refused to load a cargo and repudiated the contract. Thereupon action was brought, and the question for the Court was whether the words 'now in the port of Amsterdam' amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. The Exchequer Chamber held it to be a condition, and Williams, J., in giving the judgment of the Court, thus distinguishes the various parts or terms of a contract:—

Representa-
tion,
innocent,

'Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever

unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question however may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.'

fraudulent

Descriptive statement

Condition precedent Independent agreement

The case of *Bannerman v. White* shows that the Common Law Courts tended, if possible, to construe as a term of the contract any representation made anterior to the contract which was material enough to affect consent.

Common Law treatment of representation anterior to contract; 10 C B, N S 844

Bannerman offered hops for sale to White. White asked if any sulphur had been used in the treatment of that year's growth. Bannerman said 'No'. White said that he would not even ask the price if any sulphur had been used. They then discussed the price, and White ultimately purchased by sample the growth of that year; the hops were sent to his warehouse, were weighed, and the amount due on their purchase was thus ascertained. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops. Bannerman sued for their price. It was proved that he had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made as to the use of sulphur was not wilfully false, and they further found that 'the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the

plaintiff'. The Court had to consider the effect of this finding, and held that Bannerman's representation had been embodied in and thus became a part of the contract, a true Condition, the breach of which discharged White from liability to take the hops, although the jury had described it as a 'warranty'.

Erle, C. J., said:

Bannerman
v. White, 10
C.B., N.S.
860

'We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable. Then, the effect is that the defendants required, and that the plaintiff gave his *undertaking*, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

'The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty super-added; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged.'

Note that in this case the representation was made before the parties commenced bargaining; whereas the representation in *Behn v. Burness* was a term in the charter party.

Note, further, that the actual legal transaction between the parties was an agreement to sell by sample a quantity of hops, a contract which became a sale,¹ so as to pass the property, when the hops were weighed and their price thus ascertained. The contract of sale contained no terms making the acceptance of the hops conditional on the absence of sulphur in their treatment: and the language of Erle, C. J., shows that he felt it difficult to apply the terms 'condition' or 'warranty' to the representation made by the plaintiff.

'The undertaking,' he says, 'was a preliminary stipulation'; to introduce it into the contract was to include in the

¹ For the distinction between a sale and an agreement to sell, see p. 82, *supra*.

contract the discussion preliminary to the bargain. What had happened was that Bannerman made a statement to White, and then the two made a contract which did not expressly include this statement, though but for the statement the parties would never have entered on a discussion of terms. The consent of the buyer was, in fact, obtained by a misrepresentation of a material fact; but the Common Law Courts had precluded themselves from giving any effect to a representation unless it was a term in the contract, as in *Bannerman v. White* it was held to be. Their only remedy was to give damages for breach of a contract, but for representations which were not terms in the contract they could do nothing unless they were fraudulent. It was to meet this defect that Equity provided the remedy of rescission.

We find no general rule as to the effect of innocent misrepresentation in Equity until 1873, when, in a case somewhat similar to *Bannerman v. White*, a similar result was reached by the application of a different principle.

Equitable treatment of misrepresentation inducing contract

Lamare, a merchant in French wines, entered into negotiations with Dixon for a lease of cellars. He stated that it was essential to his business that the cellars should be dry, and Dixon assured him, to his satisfaction, that the cellars would be dry. He thereupon made an agreement for a lease, in which there was no term or condition as to the dryness of the cellars. They turned out to be extremely damp. Lamare declined to continue his occupation, and the House of Lords refused to enforce specific performance of the agreement, not because Dixon's statement as to the dryness of the cellars was a term in the contract, but because it was material in obtaining consent and was untrue in fact.

Lamare v. Dixon, L. R. 6 H L. 414

Misrepresentation a ground for refusing specific performance,

'I quite agree', said Lord Cairns, 'that this representation was not a guarantee.¹ It was not introduced into the agreement on the face of it, and the result of that is that in all probability Lamare could not sue in a Court of Law for a breach of any such guarantee

at p. 428

¹ 'Guarantee' must be understood here to mean 'warranty', and not the contract of guarantee dealt with on p. 67.

or undertaking: and very probably he could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time if the representation was made and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.'

Thus up to the passing of the Judicature Act the Court of Chancery would refuse specific performance of a contract induced by innocent misrepresentation. In transactions of certain kinds it was also prepared to set contracts aside on the same ground. The latter remedy had not been expressly limited to these transactions, but on the other hand it had not been expressly declared to be applicable to all contracts.

Effect of
Judicature
Act, 1873,
ss 24 (1), (2),
and 25 (11)

The Judicature Act provided that a plaintiff may assert any equitable claim and a defendant set up any equitable defence in any Court, and that where the rules of Equity and Law are at variance, the former shall prevail, and in their treatment of this provision there is no doubt that the Courts have extended the application of equitable remedies. Misrepresentation which brings about a contract, even though innocent, is now a ground for setting the contract aside, and this rule applies to contracts of every description.

and for
rescinding
contract

20 Ch. D. 1

The case of *Redgrave v. Hurd* was the first in which this rule was applied. It was a suit for specific performance of a contract to buy a house. Redgrave had induced Hurd to take, with the house, his business as a solicitor, and it was for misstatement as to the value of this business that Hurd resisted specific performance, and set up a counterclaim to have the contract rescinded and damages given him on the ground of deceit practised by Redgrave. The Court of Appeal held that there was no such deceit, or statement false to Redgrave's knowledge, as would entitle Hurd to damages; but specific performance was refused and the contract rescinded on the ground that defendant had been

Growth of
modern
rule

induced to enter into it by the misrepresentation of the plaintiff.

The law was thus stated by Jessel, M. R.:

'As regards the rescission of a contract there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of Equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract, obtained by material false representation, to prove that the party who obtained it knew at the time that the representation was made that it was false.'

at p 12

In *Newbigging v. Adam* the rule thus laid down was adopted as of general application. The plaintiff had been induced to enter into a partnership with one Townend by statements made by the defendants who were either the principals or concealed partners of Townend. The Court of Appeal held that 'there was a substantial misstatement though not made fraudulently, which induced the plaintiff to enter into the contract', and the contract was set aside.

34 Ch. D.
582

This principle is clearly stated by Lord Bramwell in *Derry v. Peek*, speaking of the various rights of one who has been injured by the untruth of statements inducing a contract: 'To this may now be added the equitable rule that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission'; and Lord Atkin, delivering the opinion of the Privy Council, has stated that the principle now applies to all contracts.

14 App. Ca.
347

Result

MacKenzie
v. Royal
Bank of
Canada,
[1934] A. C.
at p. 475

Thus a general rule is settled; innocent misrepresentation, if it furnishes a material inducement, is ground for resisting an action for breach of contract or for specific performance, and also for asking to have it set aside; this relief is of general application, and is not peculiar to the contracts described as *uberrimae fidei*.

Nature of
relief
given

It is perhaps well to add that the Judicature Act has not affected the Common Law rules regarding an innocent representation which has become a term of the contract,

[1913] A.C.
30

but the case of *Heilbut v. Buckleton* shows that the Courts are not now prepared to treat a representation made prior to the contract as having become a term in the contract in the absence of clear evidence that this was the intention of the parties. Words which on the face of them appear to be simply representations of fact, said Lord Haldane, may import a contract of warranty, *but only if the context so requires*, and a dictum of Holt, C. J., was cited with approval to the effect that 'an affirmation at the time of the sale is a warranty, *provided it appear on evidence to be so intended*'.

See, too,
Terrene v.
Nelson, 53
T.L.R. 963

Crosse v.
Gardner,
Carth. 90

The equitable remedy of rescission, then, merely supplements the rules of the Common Law, by providing for the case, to which they did not apply, of an innocent misrepresentation which is not a term in the contract.

(2) *Innocent Misrepresentation distinguished from Fraud*

Fraud as
a wrong

Though a contract may now be avoided on the ground of misrepresentation, whether innocent or fraudulent, the distinction is still important for reasons which will appear later. We have to ask, therefore, what constitutes fraud, and that is a question on which a doubt of long standing was settled by the House of Lords in the case of *Derry v. Peek*.

14 App. Cas.
337

What con-
stitutes
fraud

Derry v. Peek was an action in tort for deceit, and to succeed in such an action fraud must be proved. For fraud, besides being a vitiating element in contract, is also a tort in itself; whereas innocent misrepresentation, though it may vitiate a contract, is not a tort. The law was thus stated by Lord Herschell:

at p 374

or disre-
gard of
truth

'First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.'

Lord Herschell went on to point out that making a false statement through want of care falls far short of fraud; so too does a false representation honestly believed, though on insufficient grounds. But he also pointed out that when a false statement has been made, the question whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are weighty matters for consideration, for the ground upon which an alleged belief was founded is an important test of its reality. But *Derry v. Peek* has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained.¹

Angus v.
Clifford,
[1891] 2 Ch.
(C.A.) 463

On the other hand it is not necessary, to constitute fraud, that there should be a clear knowledge that the statement made is false. What is essential is the absence of any honest belief in its truth. For it may well happen in the course of business that a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false, but which he strongly suspects to have no foundation in fact. If he asserts such a thing with a confident assurance of belief, or if he neglects accessible means of information, his statement is not made in an honest belief of its truth; he may have taken care not to acquaint himself with inconvenient facts.

Reckless
misstate-
ment

Thus if directors issue a prospectus setting forth the advantages of an undertaking into the circumstances of which

¹ In order that this statement may not be misunderstood it may be useful to point out that though *Derry v. Peek* decided that there is no general duty in our law to use care in the making of representations on which it is intended that others should act, such a duty may be created by some special relation in which the person making a representation stands to the person to whom it is made. This question, however, does not relate to the formation of contract, with which this chapter is concerned. It is fully discussed in the case of *Nocton v. Ashburton*, [1914] A.C. 942, which related to the duty of care which arises out of the confidential relation between a solicitor and his client.

Reese River
Mining Co.
v. Smith,
L.R. 4
H.L. 64

Dishonest
motive
need not
be pre-
sent,
3 B & Ad.
114

they have not troubled themselves to inquire, and inducing those who read the prospectus to incur liabilities in respect of the undertaking, they commit a fraud if the statements contained in the prospectus are untrue; for they represent themselves to have a belief which they know they do not possess.

There is another aspect of fraud in which the dishonest intent is absent though the statement made is known to be untrue. In *Polhill v. Walter*, Walter accepted a bill of exchange drawn on another person: he represented himself to have authority from that other to accept the bill, knowing that in fact he had no such authority, but honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonoured at maturity, and an indorsee, who had given value for the bill on the strength of Walter's representation, brought against him an action of deceit. He was held liable.

It will be observed that in this case the representation was *known to be false*; it is therefore clearly distinguishable from the class of cases in which a representation is in fact false, but *honestly believed to be true* by the party making it.

Rex v
Kylson
(Lord),
[1932] 1 K.B.
442.
Jewson &
Sons, Ltd v.
Arcos, Ltd.
39 Com
Cas 59

We may note further that it is possible by stating a thing partially to make a statement which, in the sense in which it must be known that it will be understood, is really false. It is fraud intentionally to give a false impression and induce a person to act upon it, even though each fact stated, taken by itself, may be literally true.

(3) *Non-disclosure of material facts. Contracts uberrimae fidei*

There are some contracts in which more is required than the absence of innocent misrepresentation or fraud. In this limited class of contracts one of the parties is presumed to have means of knowledge which are not accessible to the other, and is therefore bound to tell him everything which may be supposed likely to affect his judgment.

Contracts of marine, fire, and life insurance, and indeed contracts of insurance of every kind, are of this special class. They are known as contracts *uberrimae fidei*, and may be avoided on the ground of non-disclosure of material facts, even though *restitutio in integrum* is no longer possible.

There are also other contracts, for the sale of land, for family settlements, and for the allotment of shares in companies, which, though not contracts *uberrimae fidei* in the same sense, yet present certain points of resemblance to them, and may properly be mentioned here. Among them are sometimes included contracts of suretyship and partnership, but, as it would seem, erroneously.

(a) Contracts of insurance.

The general principles of law applicable to contracts *uberrimae fidei* do not differ in essence from those applicable to other kinds of contracts, and the rule with regard to the disclosure of material facts and the penalty for non-disclosure is rather a rule of construction for a particular group of contracts. 'The rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition, contained in the contract itself, precedent to the liability of the underwriter to pay.' The insurer contracts on the basis that all material facts have been communicated to him; and it is an implied condition of the contract that the disclosure shall be made, and that if there has been non-disclosure he shall be entitled to avoid.

Insurance
contracts

Pickersgill
v London
and Pro-
vincial, &c.,
Co., [1912],
3 K.B. 614,
621

Blackburn
v. Vigors,
12 App. Cas.
531, 537,
541

So far as regards marine insurance, the Common Law rules are now codified in the Marine Insurance Act, 1906. S. 18 of the Act provides that:

Marine
insurance

(1) The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the

judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

L.R. 9 Q.B.
531

In *Ionides v. Pender* goods were insured upon a voyage for an amount largely in excess of their value; it was held that although the fact of over-valuation would not affect the risks of the voyage, yet, being a fact which underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

Per Blackburn, J.,
at p 537

'It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.'

It will be observed that under the Act the assured is, for purposes of communication, 'deemed to know' all circumstances which in the ordinary course of business he ought to know; and the same rule applies to an agent effecting an insurance for a principal. The agent must disclose everything material that he himself knows or is 'deemed to know', as well as everything that his principal is bound to disclose, unless it comes to the knowledge of the principal too late for him to inform the agent.

Fire in-
surance

New York
Bowery Fire
Insurance
Co. v. New
York Fire
Insurance
Co., 17
Wend 359

A policy of fire insurance will similarly be vitiated by the non-disclosure, however innocent, of any material facts.

Locher &
Woolf v.
West. Aust.
Ins Co
[1936] 1 K.B.
408

In an American case, referred to by Blackburn, J., in the judgment above cited, the fact that the insured had been so unlucky as to have had several fires, in each of which he was heavily insured, was regarded by the Court as a material fact, the concealment of which, whether intentional or not, vitiated the insurance. The Court of Appeal has held that in a proposal for fire insurance non-disclosure of the refusal of another insurance company to insure the proposer's motor-car may be a non-disclosure of a material fact entitling the insurer to repudiate the contract.

11 Ch. D.
363

In *London Assurance Co. v. Mansel* an action was brought to set aside a policy of life insurance on the ground that material facts had been concealed by the party effecting

the insurance. He had been asked and had answered questions as follows: Life insurance

Has a proposal ever been made on your life at other offices? If so, where? Was it accepted at the ordinary premium or at an increased premium or declined?	}	Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.
---	---	--

The answer was true so far as it went, but the defendant had endeavoured to increase his insurance at one of the offices at which he was already insured, and to effect further insurances at other offices, and in all these cases he had met with a refusal.

The contract was set aside, and Jessel, M. R., thus laid down the general principle on which his decision was founded:

‘I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.’ at p. 367

Holt's Motors v. South-East Lancashire Insurance Co. illustrates the application of the principle to accident insurance. The assured had stated, in answer to a question on the company's proposal form, that he had never been refused insurance. The policy was held to be invalidated on two grounds: (a) the assured's brokers had previously made a proposal to insure his vehicle, which had been refused by the company to which it was made. They had not informed the assured of this, but in answering the question as he did, he had made a misstatement of fact, though innocently; (b) the assured had had a previous insurance with another company, and this company, without having been asked to renew, had informed him that they were not willing to do so. His answer, in this respect, though not literally untrue, was substantially so. 35 Com. Cas. 281

(b) Contracts for the sale of land.

Sale of
land

Nottingham
Patent
Brick Co.
v Butler,
16 Q B.D.
778, 786
1 Bing N.C.
370

Contracts of this kind are not *uberrimae fidei* in the sense that a vendor has a duty to disclose to the purchaser every material fact relating to the land which is within his knowledge. In the absence of misrepresentation, innocent or otherwise, *caveat emptor* is the rule; but this is subject to certain qualifications. A vendor must disclose every material defect in his title, for if he does not make it a condition of the contract that the purchaser should accept a defective title, and the title is in fact defective, he will be unable to perform his contract. In *Flight v. Booth*, leasehold property was agreed to be purchased by the defendant. The lease contained restrictions against the carrying on of several trades, of which the particulars of sale mentioned only a few; Tindal, C. J., held that the plaintiff could rescind the contract and recover back money paid by way of deposit on the purchase of the property.

'We think it is a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.'

[1903]
2 K.B. 487

Molyneux v. Hawtrey is also a case of non-disclosure. A lease was sold by plaintiff to defendant containing onerous and unusual covenants. The vendor had not disclosed these covenants nor given to the purchaser a reasonable opportunity for informing himself of them; and the contract could not be enforced.

Shepherd
v. Croft,
[1911]
1 Ch. 527

Equitable remedies, however, can be adapted to the extent and character of the misdescription; and if this is merely a matter of detail the purchaser may be compelled to conclude the sale subject to compensation to be made by the vendor.

(c) Contracts preliminary to family settlements and arrangements need no special illustration.

(d) Contracts for the allotment of shares in Companies. Purchase of shares

The rule as to the fullness of statement required of projectors of an undertaking in which they invite the public to join is clearly stated by Kindersley, V. C., in the case of the *New Brunswick Railway Company v. Muggeridge*, in words which were approved by Lord Chelmsford in a later case in the House of Lords:

1 Dr. & Sm.
at p. 381

Venezuela
Ry. Co. v.
Kisch, L.R.
2 H.L. 113

'Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.'

But 'the duty of disclosure is not the same in a prospectus inviting share subscriptions as in the case of a proposal for marine insurance'. In an honest prospectus the non-disclosure, even of facts which some intending shareholders might regard as material in influencing their judgment, will be no ground for rescission, unless the omission makes what is stated actually misleading.

Aaron's
Reefs v.
Twiss,
[1896]
A.C. 273,
287

Two provisions of the Companies Act, 1929, which give some further protection to persons applying for shares may here be mentioned. Section 35 apparently gives a remedy in tort against persons responsible for the issue of a prospectus from which material facts required by the section to be set out are omitted, to those who suffer pecuniary loss by such omissions; and section 37 (re-enacting the provisions of the Directors' Liability Act, 1890), gives a right to compensation from the directors to persons who have sustained loss by subscribing for shares on the faith of an untrue statement in the prospectus of a company, unless the directors can show that they had reasonable ground to believe the statement and continued to believe it until the shares were allotted, or that the

statement was a fair account of the report of an expert or a correct representation of an official document.

Suretyship is not in general *uberrimae fidei*,

Lee v. Jones,
17 C.B.,
N.S. 482

(e) Suretyship and Partnership are sometimes described as contracts which need a full disclosure of all facts likely to affect the judgment of the intending surety or partner.

This statement goes too far; either contract would be invalidated by material, though innocent, misrepresentation, or by such non-disclosure of a fact as would amount to an implied representation that the fact did not exist; but neither as a rule requires the same fullness of disclosure as is necessary in a contract *uberrimae fidei*. On the other hand it is not always easy in practice to draw the line between contracts of suretyship or guarantee in the strict sense of contracts to answer for the debt, default, or miscarriage of another and contracts of insurance taking the form of contracts to indemnify against some risk stated in the contract. It was pointed out by Romer, L. J., in *Seaton v. Heath* that many contracts may with equal propriety be called contracts of insurance or contracts of guarantee, and that whether a contract requires *uberrima fides* or not depends not upon what it is called, but upon its substantial character and how it came to be effected. Generally in a contract of insurance the person desiring to be insured has means of knowledge of the risk which the insurer does not possess, and he puts the risk before the insurer as a business transaction. In a contract of guarantee, on the other hand, the creditor does not as a rule go to the surety, explain the risk, and ask him to undertake it. The surety is often a friend of the debtor and knows the risk to be undertaken, or the circumstances indicate that as between the creditor and the surety it is contemplated that the surety will take upon himself to ascertain what the risk is. Only in the exceptional cases when a contract of guarantee or suretyship has the characteristics which occur normally in a contract of insurance is the former a contract *uberrimae fidei*.

Trade Indemnity Co.
v. Workington Harbour
and Dock Board,
[1937] A.C. 1

[1899]
1 Q.B. at
p. 792

Accordingly it is settled that there is no duty of full disclosure where a surety guarantees to a bank the account of

one of the bank's customers. On the other hand, when an employer, in taking a bond from a surety for the fidelity of a servant, did not disclose the fact, known to him but not to the surety, that the servant had previously been guilty of misappropriating money while in his service, he was unable to enforce the bond when the servant subsequently committed a further misappropriation.

National
Provincial
Bank v.
Glanusk,
[1913]
3 K.B. 335.
L.G.O. Co.,
v. Holloway,
[1912]
2 K.B. 72

Further, in the exceptional cases in which a contract of suretyship is a contract *uberrimae fidei*, the surety is entitled to be informed of any subsequent agreement which alters the relation between creditor and debtor or any circumstance which would give him a right to withdraw his guarantee. So in *Phillips v. Foxall*, the defendant had guaranteed the honesty of a servant in the employ of the plaintiff; the servant was guilty of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dishonesty. The plaintiff required the defendant to make good the loss. It was held that the defendant was not liable. The concealment released the surety from liability for the subsequent loss. It would seem that if the surety learnt that the servant had committed acts of dishonesty which would justify his dismissal, he would be entitled to withdraw his guarantee.

L.R. 7 Q.B.
666

Burgess v.
Leve, 13 Eq.
450

There seems to be no rule requiring full disclosure in the formation of a contract of partnership, but since, when the partnership has been formed, the parties stand to one another in the confidential relation of principal and agent, each partner is bound to disclose to the others all material facts, and to exercise the utmost good faith in all that relates to their common business. The duties of partners, however, are now for the most part regulated by the Partnership Act, 1890.

nor part-
nership

Finally we may note the refusal of the House of Lords in *Bell v. Lever Bros.* to extend the duty of disclosing material facts. The Court of Appeal had held that the con-

Aide, p. 149

[1931] 1 K.B.
537

tracts in that case should be set aside, both on the ground of mutual mistake, and also, for reasons which are not very easy to follow, on the ground of the failure of the defendants to disclose their past breaches of duty. None of the members of the House supported this second ground of decision, and Lord Atkin said:

[1932] A.C.
at p. 227

'I see nothing to differentiate this agreement from the ordinary contract of service; and I am aware of no authority which places contracts of service within the limited category I have mentioned [of contracts *uberrimae fidei*]. It seems to me clear that master and man negotiating for an agreement of service are as unfettered as in any other negotiation. Nor can I find anything in the relation of master and servant, when established, that places agreements between them within the protected category.'

(4) *Rescission of a Contract for Misrepresentation or Non-Disclosure*

Ando, p. 154
3 App. Cas.
459

In discussing the subject of Mistake we came across cases, such as *Cundy v. Lindsay*, in which the effect of a misrepresentation of fact was to negative an apparent *consensus ad idem* and so to prevent the formation of a contract at all. But normally the effect of a misrepresentation made during the negotiations preceding the making of a contract is not to prevent the minds of the parties meeting in agreement, but to induce the party to whom it is made to enter into an agreement which is a real agreement, though it is one which he would not have made if he had not been misled by the misrepresentation. In such a case the contract is not void, but it is voidable by the party misled.

We have seen further that this right of avoidance exists whether the misrepresentation is innocent or fraudulent, and that in a limited class of contracts mere non-disclosure of a material fact has the same effect.

We have now to consider the conditions which such a misrepresentation must fulfil in order to make a contract voidable in this way. It is believed that these conditions apply equally whether the misrepresentation is innocent or

fraudulent, but it is right to point out that the cases in which they are laid down are for the most part cases of fraud, and that the reports contain few instances of contracts held to be voidable for innocent misrepresentation. The application of the rules about to be stated to innocent, as well as to fraudulent misrepresentation is to be deduced from the statements of high authority, such as have already been quoted, rather than from specific decisions of the Courts. Ande, p. 175

(a) There must be a *false representation*.

Apart from the contracts *uberrimae fidei* 'the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies outside contracts of sale.' Bell v. Lever Bros., [1932] A.C. per Lord Atkin, at p. 227

In *Keates v. Lord Cadogan*, the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house¹ which he knew to be required for immediate occupation without disclosing that it was in a ruinous condition. It was held that no such action would lie. 10 C.B. 591

'It is not pretended', said Jervis, C. J., 'that here was any warranty, expressed or implied, that the house was fit for immediate occupation: but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit.'

In the negotiations leading up to a contract there is

¹ The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not on the ground of fraud, but because 'he is offered something substantially different from that which was contracted for'. An undertaking as to sanitary condition is now implied by the Housing Act, 1936, s. 2, in the case of all tenements below a certain value.

Wilson v. Finch-Hatton, 2 Ex.D. 336

often an interval of time between the making of a representation by one party with a view to induce the other to enter into the contract and the actual conclusion of the contract, and during the interval something may happen to make a statement, which was true at the time it was made, untrue at the time it is acted upon. In such a case the person who made the representation is under an obligation to disclose the change of circumstances to the other, and if he does not do so, and the Court is satisfied that the representation remained operative in the mind of the representee, the latter may avoid the contract. This rule applies generally to all contracts and is not limited to those *uberrimae fidei* where a duty to disclose material facts exists; for in the case supposed there is more than mere non-disclosure of a material fact; there is an actual representation which is allowed to continue having its effect after it is known to have become a *false* representation.

Davies v.
London In-
surance Co.,
8 Ch. D. 469.
With v.
O'Flanagan,
[1936] 1 Ch.
375

**A repre-
sentation
of fact not
of opinion;**

Harvey v.
Young,
1 Yelv. 27.
**Lindsay Pe-
troleum Co.**
v. Hurd,
L.R. 5 P.C.
at p 243

(b) The representation must be a representation of *fact*.

A mere expression of opinion, which turns out to be unfounded, will not invalidate a contract. There is a wide difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he will: the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

In effecting a policy of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The vessel was lost there: but the Court held that the insured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the letter was not a representation of fact, but of opinion, which the insurers could act upon or not as they pleased.

The distinction between a representation of fact and a

Anderson v
Pacific In-
surance Co.,
L.R. 7 C.P.
65

statement of opinion, which in one sense always involves a representation of fact, namely, that the opinion is held by the person stating it, is discussed in the judgment of the Judicial Committee of the Privy Council in *Bisset v. Wilkinson*.

[1927] A.C.
at p. 182

Nor are commendatory expressions such as men habitually use in order to induce others to enter into a bargain dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser, though it must be admitted that the border line of permissible assertion is not always discernible. At a sale by auction land was stated to be 'very fertile and improvable': it was in fact partly abandoned as useless. This was held to be 'a mere flourishing description by an auctioneer'. But where in the sale of an hotel the occupier was stated to be 'a most desirable tenant', whereas his rent was much in arrear and he went into liquidation directly after the sale, such a statement was held to entitle the purchaser to rescind the contract.

not mere
commen-
datory ex-
pressions,

*Dimmock v.
Hallett*,
2 Ch. 21

*Smith v.
Land &
House Pro-
perty Co.*,
28 Ch. D. 7

Again, we must distinguish a representation that a thing is from a promise that a thing shall be: neither a statement of intention nor a promise can be regarded as a statement of fact except in so far as a man may misrepresent the state of his own mind. Thus there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future: in the second case he misrepresents his existing intention; he not only makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. Thus it has been laid down that if a man buy goods having at the time formed an intention not to pay for them, he makes a fraudulent misrepresentation.

nor ex-
pression of
intention.
*Burrell's
case*, 1 Ch.
D. 552

*Ex parte
Whittaker*,
10 Ch. 446

Again, it is said that wilful misrepresentation of law does not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement,

but it is not easy to see why this should be so, for any misrepresentation of a man's opinion is a misrepresentation of a fact. At any rate it seems clear that the distinction drawn in *Cooper v. Phibbs* between ignorance of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement for deceit. A decided opinion has been expressed in the King's Bench Division, that a fraudulent representation of the effect of a deed can be relied upon as a defence in an action upon the deed.

Hirschfield
v. London,
Brighton,
and South
Coast Rail-
way Co.,
2 Q.B.D. 1

Intended
to be acted
upon

L R. 6 H.L.
377

(c) The representation must be made *with the intention that it should be acted upon by the other party*.

In *Peek v. Gurney* directors were sued by persons who had purchased shares in a Company on the faith of false statements contained in a prospectus issued by the directors. The plaintiffs were not those to whom shares had been allotted on the first formation of the Company; they had purchased their shares from such allottees. It was held that the prospectus was only addressed to the first applicants for shares; that the intention to deceive could not be supposed to extend to others than these: and that on the allotment 'the prospectus had done its work; it was exhausted'.

at p. 410

The law had been so stated in an earlier case:

Barry v.
Croskey,
2 J. & H. 1
at p. 22

'Every man must be held responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, *provided it appear that such false representation was made with the intent that it should be acted upon* by such third person in the manner that occasions the injury or loss. . . . But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made.'

Andrews v.
Mockford.
[1896]
1 Q.B. 372

But if a prospectus is only part of a scheme of fraud maintained by false statements deliberately inserted from time to time in the press, its effect is not held to be exhausted by the allotment of shares, and its falsehoods will

afford ground for an action of deceit to others than the allottees; for the whole mass of false statement is intended to induce the public at large to continue to purchase shares and thus keep their value inflated.

(d) The representation must be an *inducing* cause of the contract.

Must induce the contract

The representation must form a real inducement to the party to whom it is addressed, and whether or not a person who has entered into a contract was induced to do so by a particular representation is in each case a question of fact.

This does not mean that a person to whom a false representation has been made and who has then entered into a contract must prove positively that he made the contract *propter*, and not merely *post, hoc*. Thus it was said by Lord Blackburn:

‘I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.’

Smith v. Chadwick, 9 App. Cas. at p. 196

On the other hand a man cannot be said to have been induced to enter into a contract by a representation which, though false, did not actually deceive him.

‘In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement: he must also show that he was deceived by the statement and acted upon it to his prejudice.’

Arkwright v. Newbold, 17 Ch. D. 324

Thomas bought a cannon which had been manufactured for him by Horsfall. The cannon had a defect which made it worthless, and Horsfall had endeavoured to conceal this defect by the insertion of a metal plug into the weak spot in the gun. Thomas never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that, as he was not in fact deceived, the attempted fraud having had no operation upon his mind, he could not successfully set up a plea of fraud. ‘If the plug, which it was said was put in to conceal

Horsfall v. Thomas, 1 H. & C. 9

Per Bram-
well, B. ,
at p. 99

the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.'

Smith v.
Hughes,
L.R. 6 Q.B.
per Cock-
burn, C. J.
at p. 605

This judgment has been severely criticized by high authority, but it should be remembered that the only question before the Court was whether the facts would sustain a plea of fraud, and not whether Thomas might have succeeded in an action differently framed. Moreover, it must not be understood as laying down that the mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false will deprive him of his right to say he was deceived by it. On the point of fraud, however, the principle laid down seems to be sound.

Redgrave
v Hurd,
20 Ch. D. 1

(5) *Limits of the right to rescind*

When a person has been induced to enter into a contract by a misrepresentation such as has been described, the effect on the contract is not to make it void but to give to the party misled an option, either to avoid it, or, alternatively, to affirm it.

Right of
rescission

If the party misled elects to avoid the contract, he may take steps to get it cancelled in the Chancery Division; or he may resist a suit for specific performance, or an action at common law in respect of the contract.

Limits of
right to
rescind

But this option to affirm or avoid will be lost in certain events.

Clough v
L.N.W. Ry.
Co., L.R. 7
Ex. 26

Firstly, if after becoming aware of the misrepresentation he affirms the contract either by express words or by an act which shows an intention to affirm it.

Rights of
third par-
ties

Babcock v.
Lawson, 4
Q.B.D. 394
5 Q.B.D. 284

Secondly, since the contract is voidable and not void—is valid until rescinded—if third parties bona fide and for value acquire property or possessory rights in goods obtained under the contract, these rights are valid against the party misled, whether acquired before or after he became aware of his right to rescind.

Thirdly, it has been said that when a party 'exercises his option to rescind a contract, he must be in a state to rescind; that is he must be in such a situation to be able to put the parties into their original state before the contract'. Thus a shareholder who has been induced to take shares by false statements in a prospectus cannot disaffirm his contract if he waits until a petition has been filed for the winding up of the company, or *a fortiori* if a winding-up order has been made and the company has gone into liquidation. But the mere fact that the subject-matter of the contract may have deteriorated before a fraud is discovered is not sufficient to prevent a *restitutio in integrum* and so to destroy the right to rescind the contract.

The Courts have refrained from defining the scope of this limitation on the right to rescind by any rigid rules.

'The general rule is that as a condition of rescission there must be *restitutio in integrum*, but at the same time the Court has full power to make all just allowances. It was said by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* that the practice had always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties to the state they were in before the contract.'

How this goal of doing 'what is practically just' may be reached must depend on the circumstances of the case; for instance, the Court may think that justice requires the making of some allowance for the deterioration, or the improvement, as the case may be, of the subject-matter of the contract. It will be more drastic in exercising its discretionary powers in a case of fraud than in one of innocent misrepresentation; it will be 'less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff'.

There is authority too for saying that when the misrepresentation is innocent and not fraudulent the right to

Clarke v.
Dickson,
E.B. & E.
148, *per*
Crompton,
J.

First
National Re-
insurance Co.
v. Green-
field, [1921]
1 K.B. 260

Oakes v.
Turquand,
L.R. 2 H.L.
325

Armstrong
v. Jackson,
[1917]
2 K.B. *per*
McCardie,
J., at p. 829

Lagunas
Nitrate Co.
v. Lagunas
Syndicate,
[1899] 2 Ch.
392

Hulton v.
Hulton,
[1917]
1 K.B. *per*
Swinfen
Eady, L.J.,
at p. 822
3 App. Cas.
at p. 1278

Spence v.
Crawford,
[1939] 3 All
E.R. 271,
288

Seddon v.
North
Eastern
Salt Co.,
[1905]
1 Ch. 326

98 L.T. 44

rescind cannot be exercised after the contract has been executed by the transfer of property under it. In *Hindle v. Brown*, Pickford, J., refused rescission on two grounds which he treated as being distinct from one another, namely, that the parties could not be restored to their original positions, and that a contract for the sale of a chattel could not be rescinded for innocent misrepresentation after it had been executed. Rescission of a lease duly executed, the lessee having taken possession of the premises, has been refused on the same ground.

Angel v. Jay, [1911]
1 K.B. 666

Armstrong v. Jackson,
[1917]
2 K.B.
at p. 825

But the decisions on the point seem all to be those of courts of first instance, and it is not easy to see the necessity for the rule. For, as McCardie, J., has pointed out

‘It is curious that the doctrine should cease to apply when the formal instrument of transfer has been executed, or the formal delivery of a chattel has taken place. In many cases the misrepresentation cannot, or may not, be discovered until the purchaser has secured his legal title and has therefore entered into possession of his newly acquired property.’

First National Reinsurance Co. v. Greenfield,
[1921]
2 K.B. 260
Bell v. Lever Bros.,
[1931]
1 K.B. at p. 588

Charter v. Trevelyan,
11 Cl. & F.
714
Clough v. L. & N. W. R. Co., L.R.
7 Ex. 35

It has been held that the rule does not apply to a contract to take shares, though followed by allotment and the placing of the applicant's name on the company's register; and the existence of the rule itself has been doubted in the Court of Appeal by Scrutton, L. J.

Lapse of time, though of itself it has no effect on the rights of the party misled, may, if coupled with knowledge of the misrepresentation, furnish evidence of an intention to affirm; and, in any event, delay increases the chance that the position of the parties may change, or that third parties may acquire rights and that the right to rescind may thus be lost.

Newbigging v. Adam,
34 Ch. D.
per Cotton,
L.J., at p. 588

We have seen that whereas fraud is a tort for which damages can be obtained, innocent misrepresentation, though a ground upon which a contract may be rescinded, is not one upon which damages will be given. But the rescission of a contract means that the contract is set aside, and when a contract is set aside the plaintiff is ‘with

some exceptions to be restored to his old position', and this may sometimes include the payment to him of a money indemnity. The exact principle upon which such an indemnity may be given is not altogether clear, and in the leading case where the matter was discussed the members of the Court of Appeal expressed different views. All the members of the Court were agreed that the right to an indemnity is less extensive than the right to damages. But Fry, L. J., agreeing with Cotton, L. J., was inclined to hold 'that the plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of the contract'. He did not accept the view of Bowen, L. J., 'that the obligations must be created by the contract'.

Ibid. at
p. 596

The distinction between damages and an indemnity as it works out in practice may be illustrated by the case of *Whittington v. Seale-Hayne*, where the principle adopted, however, seems to have been that suggested by Bowen, L. J. The plaintiffs had been induced to take a lease of premises by the defendant's innocent misrepresentation that they were sanitary. They started a poultry farm on the premises, and incurred expenses for outbuildings, &c. In consequence of the insanitary condition of the premises their manager fell ill and the poultry died. They claimed rescission of the lease, and an indemnity to cover the value of the stock, loss of profit on sales, medical expenses of the manager, and other expenses incurred. As the lease had been executed, it seems that it could not, if *Angel v. Jay* was rightly decided, have been rescinded, but this point does not appear to have been decided by Farwell, J., who said that, on the assumption that the plaintiffs were entitled to rescind, they would be entitled to be indemnified for what they had spent on rent, rates, and repairs, these being expenses incurred under covenants in the lease, but not for the other items of loss claimed, which were damages pure and simple.

82 L T. 49

Ante, p. 194

CHAPTER VII

Duress and Undue Influence

§ 1. *Duress*

At Common Law a contract is voidable at the option of one of the parties if he have entered into it under Duress, but the Common Law definition of Duress was narrow and technical.

In what it
consists

1 Rolle,
Abr. 688
Talbot v.
Van Boris,
[1911]
1 K.B. 854

Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent, or child; and it must be inflicted or threatened by the other party to the contract, or, at least, it must be known to him when he entered the contract.

Atlee v.
Backhouse,
3 M. & W.
633

Must be
personal

A promise which is made in consideration of the release of goods from detention is not voidable for duress. If the detention is obviously wrongful the promise would be void for want of consideration; if the legality of the detention is doubtful the promise might be supported as a compromise. But money paid for the release of goods from wrongful detention may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.

Infra, p. 430

Equity, however, will treat contracts as voidable when they have been induced by forms of pressure or coercion which do not amount to duress at Common Law. The limits of this equitable doctrine are not very clearly defined; sometimes it has been based on the ground that the pressure prevented the party concerned from being a free and voluntary agent, sometimes on the ground that it is against the general policy of the law to allow a plaintiff to maintain an action on an agreement so unfairly obtained. Thus in *Kaufman v. Gerson*, where the contract had been induced by a threat to prosecute a near relation, it was said that the Court would not enforce a contract

Williams v.
Bayley,
L.R. 1 H.L.
200.

[1904]
1 K.B. 591

'obtained by means of such moral coercion as was here used'.

§ 2. *Undue Influence*

The term 'fraud' has been used in a sense wider and less precise in the Chancery than in the Common Law Courts. This followed naturally from the remedies which they respectively administered. Common Law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract or set aside a transaction, or gave compensation, where one party had acted unfairly by the other. Thus 'fraud' at Common Law is a false statement such as is described in the preceding chapter: 'fraud' in Equity has often been used as meaning unconscientious dealing—'although, I think, unfortunately', to use the words of a great Equity lawyer. One form of such dealing is commonly described as the exercise of 'Undue Influence'.

The term 'undue influence' has sometimes been used by the Courts to describe the equitable doctrine of pressure which has just been referred to; but it also includes, and it would perhaps be convenient if it could be confined to, a rather different class of case. In cases such as *Williams v. Bayley* or *Kaufman v. Gerson* the will of one of the parties is overborne by the other in such a way as to prevent the consent which the former gives to the transaction from being a genuinely voluntary one. In the cases now to be considered, however, the consent is freely given, but Equity will scrutinize the transaction because the parties stand to one another in a relation of confidence which puts one of them in a position to exercise over the other an influence which may be perfectly natural and proper in itself, but is capable of being unfairly used.¹ In dealing with such cases the Courts have been careful not to

Fraud at
Common
Law and
in Equity
Lancashire
Loans Ltd.
v. Black,
[1934]
1 K.B. at
p. 403

Lord
Haldane in
Nocton v.
Ashburton,
[1914], A.C.
932, 953
Equitable
doctrine
of Undue
Influence

Mutual
Finance v.
Wetton &
Sons, [1937]
2 K.B. 389

¹ The distinction is pointed out by Mr. W. H. D. Winder in an article on 'Undue Influence and Coercion', in *The Modern Law Review* for 1939, vol. iii, p. 97.

fetter their jurisdiction by defining the exact limits of its exercise, but its general nature is clear.

Lord Chelmsford in *Tate v. Williamson* L.R. 2 Ch. at p. 61

‘Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.’

Most of the decisions on undue influence have arisen out of cases of gifts, but the principles which they establish apply equally to contracts. They fall into two classes, which have been thus defined:

Cotton, L. J., in *Allcard v. Skinner*, 36 Ch. D. at p. 171

(i) ‘where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose.’ Here the Court interferes ‘on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act’.

(ii) ‘where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.’ Here the Court interferes, ‘not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused’.

Smith v. Kay, 7 H.L.C. at p. 779

(i) In the first class of cases there is no presumption of undue influence, and the burden of proof rests on the promisor or donor to show that it was in fact exercised. But if this can be shown, the Courts will give relief.

‘The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Courts of Equity most ordinarily deal are those of trustee and *cestui que trust*, and such like. It applies especially to those cases, for this reason and for this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved

extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a Court of Equity are just as applicable in the one case as the other.'

The words quoted are those of Lord Kingsdown: the case was one in which a young man, only just of age, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the Court.

Similar in character was the later case of *Morley v. Loughnan*, an action brought by executors to recover money paid by the deceased to a man in whose house he had lived for some years. Wright, J., in giving judgment for the plaintiffs, said that it was unnecessary to decide whether a fiduciary relation existed between the deceased and Loughnan, for 'the defendant took possession, so to speak, of the whole life of the deceased, and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination'.

(ii) In cases of the second class it is not every fiduciary relation that raises a presumption of undue influence; it must be one of a limited class which the Courts regard as suggesting undue influence, and the relations which fall into this category (though the list is perhaps not exhaustive) are those between parent (or person *in loco parentis*) and child, solicitor and client, medical man and patient, trustee and cestui que trust, spiritual adviser and any person to whom he stands in that relation, fiancé and fiancée. Husband and wife is not one of the relations to which the presumption applies. Where the presumption does arise, it can only be rebutted by proof that the promisor or donor has been 'placed in such a position as will enable him to form an entirely free and unfettered judgment independent altogether of any sort of control'.

[1893] 1 Ch.
736

Re Coomber, [1911]
1 Ch. 723

Re Lloyds Bank, [1931]
1 Ch. 289
Howes v. Bishop,
[1909] 2 K.B.
390

Archer v. Hudson,
7 Beav. 560

Inehe
Noriah
v. Omar,
[1929] A.C.
127

The most obvious way of establishing that he was able to do this is to show that he received independent legal advice, but that is not the only way of rebutting the presumption; the essential is to show that he acted after the nature and effect of the transaction had been fully explained to him by some independent and qualified person. As was said by Lord Eldon in *Huguenin v. Baseley*, where a lady made over her property to a clergyman in whom she reposed confidence:

at p. 300

'The question is not whether she knew what she was doing, had done, or proposed to do, but how that intention was produced: whether all that care and providence was placed around her, as against those who advised her, which from their situation, and relation in respect to her, they were bound to exert on her behalf.'

It will be sufficient to mention two later cases.

[1900] 1 Ch.
243

In *Powell v. Powell* a settlement executed by a young woman, under the influence of her stepmother, by which she shared her property with the children of the second marriage, was set aside though a solicitor had advised the plaintiff. The solicitor was acting for the other parties to the settlement as well as for the plaintiff, and it appeared that although he expressed disapproval of the transaction he had not carried his disapproval to the point of withdrawing his services.

[1903] 1 Ch.
27

Wright v. Carter shows how difficult it is to maintain the validity of a sale or gift made by a client to his solicitor. On a sale the purchaser must prove that the transaction was perfectly fair, that the client knew what he was doing, and that a fair price was given. The Courts will scrutinize a gift even more closely, and as long as the relation of solicitor and client continues the presumption of undue influence will also continue; it cannot be rebutted by merely showing, as in this case, that an independent solicitor was called in to advise on the particular transaction, if, for other purposes, the relation continues.

There is another class of cases, analogous to these of

undue influence but with the element of personal influence wanting, in which Equity also throws the burden of justifying the righteousness of a bargain on the party who claims the benefit of it. Lord Selborne described these cases in *Earl of Aylesford v. Morris* as cases

L.R. 8 Ch.
at p. 490

‘which, according to the language of Lord Hardwicke, raise, “from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of the weakness—a presumption of fraud”. Fraud here does not mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.’

Earl of Ches-
terfield v.
Janssen, 2
Ves. Sen. at
p. 156

A particular case of the application of this principle, which is fully discussed in the case from which this quotation is taken, is the protection given by Equity to the class of persons described as ‘expectant heirs’. That term is not used in any technical sense, for it includes any person having ‘expectations’ (in the popular sense) of succeeding to property on another’s decease. Nor is it necessary that the expectations should have been expressly dealt with in the transaction; it is enough if the circumstances show that it was on the credit of his expectations that the plaintiff was trusted. Formerly Equity regarded bargains with expectant heirs with so much suspicion that it would upset them, even after the lapse of many years, on the ground of undervalue alone, with the result that it was made almost impossible for a person in the protected class, not merely to make a bargain which was unconscionable, but even to make one that was perfectly fair. Accordingly the Sales of Reversions Act, 1867 (now repealed and re-enacted in the Law of Property Act, 1925, s. 174), was passed to modify the equitable rules, by providing that a bargain with an expectant heir, made in good faith and without unfair dealing, is not to be set aside merely on the ground of undervalue having been given. But it is

expressly provided that the jurisdiction of the Court to set aside or modify unconscionable bargains is not affected; undervalue is still a material element in cases where it is not the *sole* ground on which relief is sought, and the Act made no change in the *onus probandi*, which still remains with the other party to the bargain.

Earl of
Aylesford v.
Morris, L.R.
8 Ch. at
p. 491

The case of the expectant heir, however, is only one illustration of a wider principle of Equity, which applies generally to what have been called 'catching bargains', that is to say, whenever 'the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker'.

O'Rourke v.
Bolingbroke,
2 App. Cas.
at p. 823

'In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of "the expectant heir", or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract.'

40 Ch. D.
312

Thus in *Fry v. Lane* it was held that when a purchase had been made from a poor and ignorant man at a considerable undervalue, the vendor having had no independent advice, a Court of Equity would set aside the transaction, even if the property was in possession, and *a fortiori* if it was reversionary.

One particular contract which easily lends itself to the kind of oppressive dealing which Equity discourages has now been dealt with by statute in the Moneylenders Acts, 1900 to 1927. These Acts do not stigmatize the transaction as *prima facie* unfair or require the moneylender to prove its fairness, but they enable any Court, in any proceedings taken by a moneylender for the recovery of money lent, to reopen the transaction if satisfied

'that the interest charged in respect of the sums actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are exces-

sive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief'.

A moneylender, according to the definition in the Act, is a person who carries on the business of moneylending as a business in itself and not as incidental to another business (such as banking); and it is sufficient to say that the Court may treat a transaction as harsh and unconscionable not necessarily because there was oppression or advantage taken of one party by the other, but because the rate of interest was excessive, having regard to all the circumstances of the case, among others to the character and value of the security given for the debt.

Litchfield v. Dreyfus,
[1906] 1
K B 584

Samuel v. Newbold,
[1906]
A.C. 461

The right to rescind contracts and to revoke gifts made under undue influence is similar to the right of rescinding contracts induced by fraud. Such transactions are voidable, not void. So soon as the undue influence is withdrawn, the action or inaction of the party influenced becomes liable to the construction that he intended to affirm the transaction.

Rescission

Presumed
affirmation

Thus in *Mitchell v. Homfray* a jury found as a fact that a patient who had made a gift to her physician determined to abide by her gift after the confidential relation of physician and patient had ceased, and the Court of Appeal held that the gift could not be impeached.

8 Q.B.D.
587

In *Allcard v. Skinner* the plaintiff allowed five years to elapse before she attempted to recall gifts made to a sisterhood from which she had retired at the commencement of that time; during the whole of the five years she was in communication with her solicitor and in a position to know and exercise her rights. In this case also the Court of Appeal held that the conduct of the donor amounted to an affirmation of the gift.

36 Ch D.
145

But the affirmation is not valid unless there be an entire cessation of the Undue Influence which had brought about the contract or gift. The necessity for such a complete relief of the will of the injured party from the dominant

depends
on cessation
of influence

influence under which it has acted is thus set forth in *Moxon v. Payne*:

L R. 8 Ch.
881

‘Fraud or imposition cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and *an absolute release from the undue influence by means of which the frauds were practised.*’

Fry v. Lane
40 Ch D
at p. 324

The same principle is applied where a man parts with a valuable interest under pressure of poverty and without proper advice. Acquiescence is not presumed from delay alone: on the contrary, ‘it is presumed that the same distress which pressed him to enter into the contract prevented him from coming to set it aside’.

Lancashire
Louns Ltd
v. Black,
[1934]
1 K B. 380

Finally we may note that a transaction into which a person has been induced to enter by the exercise of undue influence may be set aside, not only as against the person exercising that influence, but also as against a party having notice of the fact that the influence was exercised.

CHAPTER VIII

Legality of Object

THERE is one more element in the formation of contract which remains to be considered—the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects which will invalidate an agreement. The second is the effect of the presence of such objects upon the contracts in which they appear.

Two subjects of inquiry: (1) the classification of agreements invalidated by law, (2) the effects of the invalidation

§ 1. *Classification of agreements which are illegal or void*

An agreement may be invalidated either by express statutory enactment or by rules of Common Law.

Further, the law may either actually forbid an agreement to be made, or it may merely say that if it is made the Courts will not enforce it. In the former case it is illegal, in the latter only void; but inasmuch as illegal contracts are also void, though void contracts are not necessarily illegal, the distinction is for most purposes not important, and even judges seem sometimes to treat the two terms as interchangeable. For the present, therefore, it is proposed to disregard the distinction between illegal and void contracts, and to return to it in a later part of this chapter.

Infra, p. 243

(1) *Contracts which are illegal or void by Statute*

A statute may declare that a contract is illegal or that it is void. There is then no doubt of the intention of the Legislature that such a contract should not be enforced.

Effects of statutory prohibition

But a statute may impose a penalty on the parties to a contract, without declaring it to be either illegal or void.

Victorian
Daylesford
Syndicate
Ltd. v. Dott,
[1905] 2 Ch.
624.

Anderson v.
Daniel,
[1924]
1 K.B. 138.

The effect in such a case depends on the proper construction of the particular statute. But where the words of the statute leave room for doubt as to its intention, it is material to ask whether the object of the Act in imposing the penalty is merely to protect the revenue, or whether its object or one of its objects is to protect the general public or some class of the general public by requiring that the contract shall be accompanied by certain formalities or conditions, as, for example, registration in the case of a moneylender. In the latter case it is probable that the act for the doing of which the penalty is imposed is impliedly prohibited by the statute and therefore illegal.

It may also be useful to ask whether the penalty is imposed once for all, or whether it is a recurrent penalty imposed every time the act is done. In the latter case it is evidently the intention of the statute that the act should be prohibited.

Objects of
statutory
prohibition

We need not discuss here in any detail the various statutes by which certain contracts are prohibited or penalized. They relate for the most part (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business.

Wagering
contracts

There is, however, a kind of contract which has been the frequent subject of legislation, and which from its peculiar character calls for analysis as well as for historical treatment. This is the wager.

Carlill v.
Carbolic
Smoke Ball
Co., [1892]
2 Q.B. *per*
Hawkins, J.,
at p. 490
Weddle
Beck & Co.
v. Hackett,
[1929]
1 K.B. 321

‘A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by

either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.'

There must therefore be mutual chances of gain and loss. But it is to be observed that the event may be uncertain, not only because it is a future event, but because it is not yet ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which is over, though the parties do not know in whose favour it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be the accuracy of each man's judgment rather than the determination of a particular event.

The parties must contemplate the determination of the uncertain event as the sole condition of their contract. For example, if *A* contracts to sell goods to *X*, delivery to be made three months hence, and the price to be the market price at the date of delivery, it may be said that *A* stands to lose or gain upon a future event which is uncertain, that is to say, according as the market falls or rises. But this element of chance is merely an incident in the larger transaction of a contract for the sale of goods on certain terms; it does not convert that transaction into a wagering contract. The object of a wager is to make a gain purely as the result of the decision of an uncertain event. One party backs his knowledge, skill, or luck against that of the other, and in a true wager this is the whole transaction.

We must therefore distinguish a wager from certain other transactions in which there may be chances of gain and loss to the parties depending on the determination of an uncertain event, but in which these chances are merely incidental to some other object which the parties have in view.

*Ironmonger
v Dyne*, 44
1 L R 497

and in-
surance

Wilson v
Jones, L. R.
2 Ex. at pp
141, 150

Contracts of insurance bear a certain superficial resemblance to wagering contracts, but they are really transactions of a different character, and in the definition of a wager cited above from Hawkins, J., they are excluded by the provision that the parties have no interest in the contract other than that which they create by the bet. If *A* insures his cargo with *X*, an underwriter, that is to say, if he agrees with *X* that in consideration of his paying a premium of £50, *X* will pay him £5,000 if the cargo is lost by certain specified perils, *A* cannot, except by straining the use of words, be said to bet against the safety of his own cargo. His object is to preserve himself from a financial loss if his property perishes, and not that he should gain and *X* lose if an uncertain event turns out in a particular way. Such a transaction is quite different from the transaction of backing a horse, even one's own horse, to win the Derby, or even from the transaction of betting against one's own horse winning, for the proprietary interest of the owner in his horse does not enter into the transaction in either of these cases. If we seek an analogy to a contract of marine insurance in the sphere of sport, we should find it rather in a contract insuring the safety of a valuable horse in a point-to-point race, but this would not be a wager.

Similarly, if *A* insures his life by a policy involving the payment of premiums during his whole life, he cannot, without absurdity, be said to back himself for a short life; what he does is to buy a certain future provision for his dependants at a price which will be fixed according to the number of years he lives. No doubt, if he has a long life, the transaction will prove financially unprofitable, but almost any commercial transaction may involve chances of profit and loss.

A genuine insurance transaction, therefore, is not a wagering contract, though a transaction purporting to be one of insurance may sometimes turn out to be nothing but a wager. This abuse has been dealt with by the

Legislature, which makes the existence or non-existence of an 'insurable interest' the distinction between a genuine insurance transaction and a wager. Marine insurance

The Marine Insurance Act, 1906, provides that a contract of marine insurance is to be deemed to be a gaming or wagering contract if the insured has no 'interest', actual or prospective, in the adventure, or if the policy contains words which make proof of interest unnecessary. And an Act of 1774 deals with insurance generally (marine insurance excepted), and forbids insurances on the lives of any persons, or on any events whatsoever in which the person effecting the insurance has no interest. This Act further requires that the names of the persons interested should be inserted in the policy, and provides that no sum greater than the interest of the insured at the time of insurance should be recovered by him. Insurance generally
14 Geo III,
c 48

Stock Exchange transactions are another form of business transaction which easily lend themselves to mere wagering contracts. The law cannot be said to frown upon speculation in stocks and shares as such; but if a transaction is no more than 'an agreement to pay differences', that is to say, if the parties do not intend a real transaction by the purchase and delivery of actual stocks and shares, but only that one of them shall receive from the other the difference between the contract price of a particular security and its market price on the settling day, they are doing no more than bet on the price of the security at a future date. If a transaction is found as a fact to be essentially an agreement to pay differences, a term to the effect that either party may at his option require completion of the purchase will not be enough to alter its character. Such a term has been said to be inserted only 'to cloak the fact that it was a gambling transaction and to enable the parties to sue one another for gambling debts'. Thacker v
Hardy, 4
Q B D 685

Universal
Stock Ex-
change v.
Strachan,
[1896] A C.
173

We may leave here the analysis of a wager, and look at the history of the law respecting wagering contracts. At Common Law all wagers were enforceable, and, until the History of
the Com-
mon Law
as to
wagers;

Jackson v.
Colegrave,
(1694) Car-
thew, 338

March v.
Pigot, 5
Burr. 2802

latter part of the eighteenth century, were only discouraged by some trifling difficulties of pleading. Thus in 1771 Lord Mansfield heard without protest an action on a wager made at Newmarket by which two young men agreed 'to run their fathers (to use the phrase of that place) each against the other'; that is, to bet on the duration of their fathers' lives. It so happened that the father of one of them was (unknown to either) already dead, and the arguments in the case were solely concerned with the question whether a term was to be implied in the contract analogous to the 'lost or not lost' of a marine insurance policy.

But as the Courts found that frivolous or indecent matters were brought before them for decision, rules came to be established that a wager was not enforceable if it could only be proved by evidence which was indecent or was calculated to injure or pain a third person, or, as a matter of public policy, that any wager which tempted a man to offend against the law was illegal.

Gilbert v.
Sykes, (1812)
16 East, 150

Strange and even ludicrous results followed from these efforts of the Courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be a contract which the Courts would not enforce, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it is evident that the substantial motive which pressed upon the judges was 'the inconveniences of countenancing idle wagers in courts of justice', the feeling that 'it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to'.

Bayley, J.,
in Gilbert
v. Sykes,
p. 162

16 Car. II,
c 7
of Statute
as to
wagers

The Legislature had, however, dealt with certain aspects of wagering contracts. It was enacted by an Act of 1664, now repealed, that any sum exceeding £100 lost in playing at games or pastimes, or in betting on the players, should be irrecoverable, and that all forms of security given for

money so lost should be void. The law was carried a stage further by an Act of 1710, whereby securities of every kind, whether given for money lost in playing at games, or betting on the players, or knowingly advanced for such purposes, were rendered wholly void. 9 Anne, c. 14

It will be observed that these two Acts only dealt with wagers on 'games and pastimes' (which include horse-racing), and did not affect wagers of other kinds, such as a wager on the result of a contested election. It will be seen hereafter that the distinction is still of importance. 'Games and pastimes'

Cases of hardship resulted from the working of this Act. Securities might be purchased from the holders of them by persons ignorant of their origin. These persons, when they sought to enforce them against the giver of the security, discovered, too late, that they had paid value for an instrument which was by statute wholly void as against the party losing at play. The Gaming Act, 1835, s. 1, therefore enacted that securities which would have been void under the Act of Anne should henceforth be deemed to have been made, drawn, or accepted for an *illegal* consideration. The holder of such an instrument may therefore enforce it, even after proof of its illegal inception, if he is able to show that he gave value for it and was ignorant of its origin: in other words—that he is a '*bona fide* holder for value'. Woolf v. Hamilton, [1898] 2 Q.B. 338
5 & 6 Will. 4, c. 41
Infra, p. 245

The next step was to make wagers of all kinds void: this was done by the Gaming Act, 1845, s. 18, which enacts:

'That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.'

It will be noticed that this Act did not affect the distinction established by the earlier Acts between wagers on games and pastimes and other wagers, *so far as concerns securities given in respect of each class of wager*. Securities Gaming Act, 1845
Morgan v. Ashcroft, [1938] 1 K.B. 49

given in respect of wagers on games and pastimes, or in respect of money lent for betting on such games or pastimes, are still (by reason of the Act of 1835) deemed to be given on an *illegal* consideration; but since the Gaming Act, 1845, securities given in respect of other wagers are given merely on a consideration which the Act makes *void*; that is to say, they are given for no consideration at all.

Agree-
ments in
respect of
wagers

It remained to deal with certain agreements arising out of wagers or made in contemplation of them. Wagers being only *void*, no taint of illegality attached to a transaction, whereby one man employed another to make bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case.

Gaming
Act, 1892

The Gaming Act, 1892, altered the law in this respect:

'Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.'

A man cannot now recover commission or reward promised to him for making or for paying bets: nor can he recover money paid in discharge of the bets of another. Whether he is a betting commissioner who pays the bets which he has been employed to make and, if lost, to pay: or whether, on request, he settles the accounts of a friend who has lost money at a race-meeting, he cannot successfully sue for money so paid.

Saffery v.
Mayer,
[1901]
1 K.B. 11

Woolf v.
Freeman
[1937], 1 All
E.R. 178

Loans for
Gaming

Re O'Shea,
[1911]
2 K.B. 981

But the Court of Appeal has held that money knowingly lent to *pay* bets is not money paid 'in respect of' a contract rendered null and void by the Gaming Act, 1845; accordingly it does not fall under the Act of 1892, and may still be recovered. This leads to the ridiculous result that if *A* lends money to the loser of a wager for the loser to pay the winner with, *A* can recover; whereas if *A* pays the money direct to the winner on the loser's behalf, he

cannot recover, for then he has paid it 'in respect of' a contract avoided by the Act of 1845.

Probably money knowingly lent for *making* bets is similarly outside the Act of 1892; it is not money paid 'under or in respect of' a contract made void by the Act of 1845. But here we have also to ask whether the Act of 1835 makes such a loan irrecoverable, and as that Act only deals with securities it apparently does not affect the transaction if no security is given; in that case the loan seems to be recoverable. But if a security *is* given, then the security at least is deemed under the Act of 1835 to have been given on an illegal consideration, and the question is whether this by implication makes the loan also irrecoverable. The better opinion seems to be that it does, so that here we have another of the many indefensible anomalies which disfigure our law of wagering.¹

Carlton
Hall Club
v. Laurence,
[1929] 2
K B 159

It is clear, however, that one who is employed to make bets on behalf of another and who receives the winnings cannot keep them. This is money received on behalf of another under a contract of agency, and is not money paid 'in respect of' a contract made void by the Act of 1845.

De Mattos
v. Benjamin,
63 L J
[Q B] 248

And money deposited with a stakeholder to abide the event of a wager is not money 'paid'. For the word 'paid' means 'paid out and out', and is not properly applicable to a deposit of money for the purpose of paying a third party which is revocable until it has been paid away on the determination of the bet.

Burg. v
Ashley &
Smith, Ltd.,
[1900] 1
Q B 744

The Act of 1845 repealed the Act of Charles II and substantially that of Anne, so that, apart from Acts forbidding lotteries and certain games, and Acts regulating insurance, we now have three statutes relating to wagers—the Gaming Act, 1835, as to securities given for money lost on certain kinds of wager; the Gaming Act, 1845, as to wagers in general; the Gaming Act, 1892, as to certain

General
effect
of the
Gaming
Acts

¹ It must be remembered, also, that certain games, such as hazard and roulette, are made illegal by statutes, and therefore money lent for playing at such games cannot be recovered. *McKinnell v. Robinson*, 3 M. & W. 434; *Jenks v. Turpin*, 13 Q.B.D. 505.

transactions, other than securities, closely connected with wagers.

(2) *Contracts illegal or void at Common Law*

(a) *Agreements to commit an indictable offence or civil wrong*

**Agree-
ment to
commit
a crime
or wrong**

It is plain that the Courts would not enforce an agreement to commit an act which is criminal at Common Law or by statute.

2 Lev. 174

Clay v.
Yates, 1
H & N 73

Nor again will the Courts enforce an agreement to commit a tort. An agreement to commit an assault has been held to be void, as in *Allen v. Rescous*, where one of the parties undertook to beat a man. So, too, has an agreement involving the publication of a libel; or the perpetration of a fraud.

Mallalieu v.
Hodgson, 16
Q B. 689

A debtor making a composition with his creditors of 6s. 8d. in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forgo a portion of his debt in consideration that the others would forgo theirs in a like proportion. 'Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void.' On the same ground the Courts will not support a condition in a contract that in the event of a man's becoming bankrupt certain articles of his property should be taken from his creditors and go to the promisee.

Ex parte
Barter, 26
Ch D. 510

Begbie v.
Phosphate
Sewage Co.
L R. 10
Q B. at p.
499.
Scott v.
Brown,
[1892]
2 Q.B. 724

An agreement forming part of a scheme for promoting a company, in which the object of the promoters was to defraud the shareholders, will not furnish a cause of action. And an agreement between a number of persons to purchase shares for the purpose of inducing the public to believe that there was a market in the shares and that the shares were selling at a real premium was held to be an illegal transaction, indictable as a conspiracy, and no action could be maintained in respect of the purchase.

In *Alexander v. Rayson* the plaintiff let a flat to the defendant. The transaction was effected by two documents, (1) a lease of the flat at a rent of £450 p.a., covering certain services to be rendered by the lessor, and (2) an agreement to render services which were substantially the same, except for the provision and maintenance of a frigidaire, in consideration of an extra £750 p.a. A dispute having arisen as to the rendering of the services, the defendant declined to pay an instalment due under the agreement, alleging, *inter alia*, that the plaintiff had obtained it for the purpose of deceiving the local authority as to the true rateable value of the premises. The Court of Appeal held that, if the documents were intended to be used for this fraudulent purpose, the plaintiff was not entitled to the assistance of a Court of Law in enforcing either the lease or the agreement.

[1936]
1 K.B. 169

We may perhaps also classify under this head certain contracts which the law discourages as tending to enable persons to commit crimes or torts with impunity. It has been held that a motorist may recover under a policy of insurance against third party risks though the loss which he seeks to recover was incurred by his own gross and even criminal negligence. But the Court of Appeal has thrown some doubt on the correctness of these decisions in a case which shows that a contract to indemnify against the consequences of an *intentional* act, which is in fact criminal, even though the doer may not know this, cannot be enforced. Thus a solicitor who had entered into a 'champertous' agreement, though without realizing that he was committing a criminal offence, could not claim to be indemnified under a policy which, as he alleged, insured him against loss arising from the commission of such an act.

Tinline v.
White Cross
Insurance
Association
Ltd.,
[1921]
3 K.B. 327.
James v.
British
General
Insurance
Co., [1927]
2 K.B. 311.
Haseldine
v. Hosken,
[1933]
1 K.B. 822

Infra, p. 221

In another case newspaper proprietors, who purported to give in their journal honest advice to intending purchasers of Canadian land, nevertheless for a valuable consideration promised a person interested in Canadian land

Neville v.
Dominion of
Canada
News Co.,
[1915]
3 K.B. 556

companies not to publish any comments on any land company with which he might be connected. It was held that an agreement which would prohibit them from warning the public even against a fraudulent or dishonest scheme could not be enforced.

Beresford v.
Royal Insur-
ance Co.,
Ltd., [1938]
A.C. 586

A life insurance policy cannot be enforced when the assured feloniously commits suicide, for the law will not aid either a criminal or his representatives to reap the fruits of a crime. The House of Lords so held although the policy contained a term avoiding it in the event of suicide within a year of its commencement, and the suicide occurred after the policy had run for some years.

(b) *Agreements to do that which it is the policy of the law to prevent*

Public
policy

General
applica-
tion

16 East, 150
ante, p. 210

Egerton v.
Earl Brown-
low, 4 H.
L.C. 1

Printing Co
v. Sampson,
19 Eq. 465

The policy of the law, or public policy, is a phrase of common use in estimating the validity of contracts. Its history is obscure; it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were a frequent provocative of judicial ingenuity on this point, as is shown by the case of *Gilbert v. Sykes* quoted already: but it does not seem probable that the doctrine of public policy began in the endeavour to elude their binding force. Whatever may have been its origin, it was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth and the commencement of the nineteenth century. Later decisions, however, while maintaining the duty of the Courts to consider the public advantage, have tended to limit the sphere within which this duty may be exercised. Jessel, M. R., in 1875, stated a principle which is still valid for the Courts, when he said: 'You have this paramount public policy to consider, that you are not lightly to inter-

fere with the freedom of contract';¹ and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises.

Fender v.
Mildmay,
[1938] A.C. 1

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said, 'Public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. . . . If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally.'

Wilson v.
Carnley,
[1908]
1 K B. at
p. 738

Legal Essays
& Addresses,
pp 76, 78

We may arrange the contracts which the Courts will not enforce because contrary to the policy of the law under certain heads.

Agreements which injure the state in its relations with other states

These fall under two heads, friendly dealings with a hostile state, and hostile dealings towards a friendly state.

Contracts with alien enemies have already been discussed. It is unlawful to enter into such a contract or to perform during war a contract made with an alien enemy before war broke out. And it has been shown how a contract which in terms provides for the suspension of all rights and obligations arising under it while war continues may yet be held to be void on grounds of public policy as tending, merely by its continued existence, to promote the economic interests of the enemy state or to prejudice those of this country.

Contract
with alien
enemy,

1 *soposito v.*
Bowden,
7 E & B. 763

Ante, p 117

¹ This dictum of course referred to the duty of the Courts of Law. It was not an expression of opinion as to the policy of the law generally. Few people to-day would regard freedom of contract as the 'paramount' interest of legislative policy.

or hostile
to friendly
state

De Wütz v.
Hendricks,
2 Bing. 316

Holman v.
Johnson, 1
Cowp. 343

Ralli v.
Compañia
Naviera, &c.,
[1920]
2 K B. 287,
300, 304

Foster v.
Driscoll,
[1929]
1 K.B. 470

Kleinwort
Sons & Co.
v. Ungari-
sche Baum-
wolle Aktien-
gesellschaft,
[1939]
2 K B. 678

An agreement which contemplates action hostile to a friendly state is unlawful and cannot be enforced. So the Courts will afford no assistance to persons who 'set about to raise loans for subjects of a friendly state to enable them to prosecute a war against their sovereign'.

There is no trustworthy authority for a *dictum* of Lord Mansfield that 'no country ever takes notice of the revenue laws of another', and it seems now clear that an agreement to break the revenue or other laws of a friendly state would not furnish a cause of action. 'This country', it has been said, 'should not assist or sanction the breach of the laws of other independent states.' Thus the Court of Appeal has refused to entertain an action arising out of certain complicated transactions having for their object to take advantage of the illicit market for whisky existing in the United States during the era of prohibition. This, however, does not mean that when a contract is to be performed in this country our Courts will refuse to enforce it merely because its performance might involve a foreign defendant in a breach of his own law. The Court of Appeal refused to extend the rule in this way in a case in which Hungarian legislation was said to have made it illegal for Hungarians to pay sums in sterling in London except with the permission of the Hungarian National Bank, pointing out that it would be intolerable if English creditors, in respect of obligations to be performed here, could be deprived of their rights in this way.

Agreements tending to injure the public service

Sale of
offices

The public has an interest in the proper performance of their duty by public servants, and is entitled to be served by the fittest persons procurable. Courts of Law hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices.

2 B. & C.
661

In *Card v. Hope*, which is perhaps an extreme case, a deed was held to be void by which the owners of the

majority of shares in a ship sold a portion of them, the purchaser acquiring the command of the ship for himself and the nomination to the command for his executors. The ship was in the service of the East India Company, and this had been held equivalent to being in the public service, but the judgment proceeded on the ground that the public had a right to the exercise by the owners of *any* ship of their best judgment in selecting officers for it. The public has a right to demand that no one shall be induced merely by considerations of private gain to enter or refrain from entering its service.

Blachford v.
Preston,
8 T.R. 89

5 & 6 Ed. 6,
c. 16.
49 Geo. 3.
c. 126

Thus what has been called 'the policy of the law' will not uphold a contract whereby a person agreed to use his influence or position for the purpose of securing a benefit from the government; or a disposition of property made upon the condition that the holder should never enter the naval or military service of the Crown; or an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association; or an agreement whereby a man made a donation to a charity in consideration of a promise to secure him a knighthood.

Montefiore
v. Menday
Motor Co.,
[1918]
2 K.B. 241

Re Beard,
[1908] 1 Ch.
383

Osborne v.
Amalgamated Soc.
of Railway
Servants,
[1910] A.C.
87

Parkinson
v. College of
Ambulance,
Ltd. [1925]
2 K.B. 1

The rule against the assignment of the salary of a public office is based on a somewhat different principle. 'It is fit', said Lord Abinger in *Wells v. Foster*, 'that the public servants should retain the means of a decent subsistence without being exposed to the temptations of poverty.' And in the same case, Parke, B., lays down the limits within which a public pension is assignable. 'A man may always assign a pension given to him entirely for past services'; but 'where a pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable.'

Assign-
ment of
salaries,
8 M. & W.
151

or pen-
sions

Agreements which tend to pervert the course of justice

Stifling
criminal
proceed-
ings,

Williams v.
Bayley,
L.R. 1 H L.
200, 220

except
where
civil and
criminal
remedies
co-exist

These most commonly appear in the form of agreements to stifle prosecutions, as to which Lord Westbury said, 'You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself.'

An exception to this rule is found in cases where civil and criminal remedies co-exist: a compromise of a prosecution is then permissible. The exception and its limits are thus stated in the case of *Keir v. Leeman*:

6 Q B 321,
and see
9 Q B 395

'We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.'

45 Ch. D.
351

This statement of the law was adopted in 1890 by the Court of Appeal in *Windhill Local Board v. Vint*.

Howard v.
Odham's
Press, [1938]
1 K B at
p 42

A contract not to disclose the fact that a crime has been committed is not necessarily against public policy; for example, the Court of Appeal has pointed out that 'it may well be permissible for a person against whom frauds have been or are intended to be committed to give a promise of secrecy in order to obtain information relating to them which will enable him, by taking steps himself, to prevent the commission of future frauds'. But such a contract is void if, as in the case from which these words are taken, its effect is not merely to enable the party to whom the information is given to protect himself, but to preclude him from disclosing information as to frauds committed or contemplated against others to whom such information would be of use in preventing the commission of such frauds.

Another example of illegal agreements of this class is an indemnity given to one who has gone bail for an accused person, whether such indemnity be given by the prisoner

himself, as in *Herman v. Jeuchner*, or by a third person on his behalf, as in *Consolidated Exploration Co. v. Musgrave*.
15 Q.B.D. 561 (C.A.), [1900] 1 Ch. 37

Agreements which tend to abuse of legal process

Under the old names of Maintenance and Champerty two objects of agreement are described which the law regards as unlawful. They tend to encourage litigation which is not bona fide but speculative. It is not thought right that one should buy an interest in another's quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be 'when a man maintains a suit or quarrel to the disturbance or hindrance of right'. Main-
tenance

Champerty is where 'he who maintains another is to have by agreement part of the land, or debt, in suit'. Com Dig
vol v, p. 22

Maintenance is a civil wrong which does not often figure in the law of contract. It is thus defined by Lord Haldane in *Neville v. London Express*, where all the law upon the subject will be found: [1019] A.C.
368, 390

'It is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence.'

Thus the giving of an indemnity to an informer against costs incurred in endeavouring to enforce a statutory penalty is maintenance, and the person giving it may be sued for damages by the person against whom the action was brought. Nor is the success of the maintained litigation, whether it be a claim or a defence, any answer to the action, though it will usually prevent the recovery of more than nominal damages. Bradlaugh
v Newde-
gate, 11
Q B D. 5

But it is not wrongful to provide the means by which a poor man may maintain a suit, even though the charity may be misguided and the action groundless, provided it be disinterested, and the same principle applies with greater force to the case of a kinsman or servant. Neville v.
London
Express,
[1019] A.C.
368
Harris v.
Brisco, 17
Q B D 504
Gram v.
Hutt, [1914]
1 Ch. 98

Cham-
perty

Stanley v.
Jones,
7 Bing 369.
Rees v. de
Bernardy,
[1896] 2 Ch.
447

Infra, p. 267

Champerty, or the maintenance of a quarrel for a share of the proceeds, is a species of Maintenance, and has been repeatedly declared to avoid an agreement made in contemplation of it. It is not unlawful to supply information which will enable property to be recovered, in consideration of receiving a part of the property when recovered, but if the person giving such information is to assist in the recovery by procuring evidence or other means, the arrangement is contrary to the policy of the law and void. The question whether the purchase of a right of action already accrued is obnoxious to the rules against champerty is considered later in connexion with the general subject of assignment of choses in action.

Agreements which are contrary to good morals

The only aspect of immorality with which Courts of Law have dealt is sexual immorality; and the law upon this subject may be shortly stated.

Ayerst v.
Jenkins,
16 Eq 275

A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is unlawful whether made by parol or under seal.

Beaumont
v. Reeve,
8 Q.B. 483

But a promise made in consideration of past illicit cohabitation is not made on an illegal consideration, but is a mere gratuitous promise, binding if made under seal, void if by parol.

And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known by both parties to be so intended.

L.R. 1 Ex.
213

In *Pearce v. Brooks*, a coach-builder sued a prostitute for money due for the hire of a brougham, let out to her with the knowledge that it was to be used by her in the furtherance of her immoral trade. It was held that the coach-builder could not recover. And a landlord, who had let premises to a woman who was to the knowledge of the landlord's agent the kept mistress of a man who was in the habit of visiting her there, was not permitted to recover his rent.

Upfall v.
Wright,
[1911]
1 K.B. 506

*Agreements which affect the freedom or security of Marriage
or the due discharge of parental duty*

Such agreements, in so far as they restrain the freedom of marriage, are discouraged on public grounds as injurious to the moral welfare of the citizen. Thus a promise under seal to marry no one but the promisee on penalty of paying her £1,000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive.

Restraint
of mar-
riage
Lowe v.
Peers,
4 Burr. 2225

What are called marriage brokage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal 'not for the sake of the particular instance or the person, but of the public, and that marriages may be on a proper foundation'. And so an agreement to introduce a person to others of the opposite sex with a view to marriage is unlawful, although there is a choice given of a number of persons, and not an effort to bring about marriage with a particular person.

or of free-
dom of
choice
Cole v.
Gibson,
1 Ves. Sen.
503
Hermann v.
Charles-
worth,
[1905] 2
K B 131

The breach of a promise to marry after his wife's death, made by a married man to a woman who knows him to be married, is not actionable. Such a contract is 'not only inconsistent with that affection which ought to subsist between married persons, but is calculated to act as a direct inducement to immorality'. But this reasoning does not hold when it has become clear that that affection has been irrevocably lost, and an action will lie on a promise by a married man, against whom a decree nisi has been obtained, to marry a woman after his divorce has been made absolute.

Wilson v.
Carnley,
[1908]
1 K.B. at
p. 740

Fender v.
Middaay,
[1938] A.C. 1

Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation; but it is otherwise if they contemplate a possible separation in the future, because then they give inducements to the parties not to perform 'duties in the fulfilment of which society has an interest'.

Agree-
ments for
separa-
tion

Cartwright
v. Cart-
wright,
3 D.M. & G.
989

And for the same reason an agreement by a mother to

Parental
duty

Humphrys
v. Polak,
[1901]
2 K.B. 385

transfer to another her rights and duties in respect of an illegitimate child has been held illegal, because the law imposes a duty on the mother in respect of the infant and for its benefit. In a proper case, however, an adoption order might now be obtained from the Court under the Adoption of Children Act, 1926.

Agreements in restraint of trade

Restraint
of trade

The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but these changes have on the whole been a continuous development of a general rule.

Colgate v.
Bacheler,
Cio. Litz.
872 (1596)

The early cases show a disposition to avoid all contracts 'to prohibit or restrain any, to use a lawful trade at any time or at any place', as being 'against the benefit of the Commonwealth'. But soon it became clear that the Commonwealth would not suffer if a man who sold the goodwill of a business might bind himself not to enter into immediate competition with the buyer; thus it was laid down in *Rogers v. Parry* that 'a man cannot bind one that he shall not use his trade generally', 'but for a time certain and in a place certain, a man may be well bound and restrained from using of his trade'.

Bulstrode,
136 (1613)

Permis-
sible re-
strictions

Mitchel v.
Reynolds,
(1711)
1 P. Wms.
181

A rule thus became established that contracts in general restraint of trade were invalid, but that contracts in partial restraint would be upheld. 'What does it matter' it was said, 'to a tradesman in London what another does at Newcastle?'

But as trade expanded and the dealings of an individual ceased to be confined to the locality in which he lived, the distinction between general and partial restraints passed into a distinction between restraints unlimited as to place and restraints unlimited as to time, and it was laid down that a man might not contract himself out of the right to carry on a certain trade *anywhere*, for ten years, though he might contract himself out of the right *ever* to carry on a trade within ten miles of London.

The rule as thus expressed was inapplicable to the modern conditions of trade. In the sale of a goodwill or a trade secret the buyer might in old times have been sufficiently protected by limited restrictions as to the place or persons with whom the seller should henceforth deal. This is not so where an individual or a company supplies some article of commerce to the civilized world; and the policy of the law in respect of restraints of trade was adapted to modern conditions in the case of *Maxim-Nordenfelt Gun Co. v. Nordenfelt*.

extended
by public
policy

Nordenfelt was a maker and inventor of guns and ammunition: he sold his business to the Company for £287,500, and agreed that for twenty-five years he would cease to carry on the manufacture of guns, gun-carriages, gunpowder, or ammunition, or any business liable to compete with such business as the Company was carrying on for the time being. He retained the right to deal in explosives other than gunpowder, in torpedoes or submarine boats, and in metal castings or forgings.

[1894] A.C.
535

After some years Nordenfelt entered into business with another Company dealing with guns and ammunition; the plaintiffs sought an injunction to restrain him from so doing.

The House of Lords, affirming the judgment of the Court of Appeal, were of opinion

(1) That the covenant not to compete with the Company in *any* business which it might carry on was a general restraint of trade, that it was unreasonably wide and therefore void, but that it was distinct and severable from the rest of the contract;

General
restraint
void

(2) that the sale of a business accompanied by an agreement by the seller to retire from the business, is not void, provided it is reasonable between the parties, and not injurious to the public, and

Partial
restraint
good,

(3) that the restraint in this case, in so far as it protected the business actually sold, was reasonable between the parties, because Nordenfelt not only received a large sum

if reason-
able be-
tween the
parties,

and not
injurious
to public

Is general
restraint
always
void?

Per Lord
Macnaghten,
at p. 565

of money, but retained scope for the exercise of his inventive and manufacturing skill, and because the wider area over which the business extended necessitated a restraint coextensive with that area for the protection of the plaintiffs. Nor could it be said to be injurious to the public interest since it transferred to an English Company the making of guns and ammunition for foreign lands.

The House of Lords, after considering all the authorities, made it clear that the division of agreements in restraint of trade into two classes—general and partial (the former being necessarily void in all cases, the latter only if unreasonable or injurious to the public interest)—could no longer be sustained, even if it had ever existed as a rule of the Common Law.

‘The true view at the present time, I think, is this: The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.’

Lord Macnaghten’s judgment in this case is the foundation of all modern law on the subject of restraint of trade, and as a result of it and of later cases in which it has been elucidated we may lay down certain propositions of law.

(1) *All* restraints of trade, in the absence of special justifying circumstances, are contrary to public policy and therefore void. This proposition, as Younger, L. J., has pointed out, was counter to a long line of cases in which it had been laid down that a partial restraint was *prima facie* valid; but it has been repeatedly reasserted by the House of Lords and is now beyond challenge.

Attwood v.
Lamont,
[1920]
3 K.B. at
p. 587
Mason v.
Provident
Clothing Co.,
[1913]
A.C. 724
Morris v.
Saxelby,
[1916]
1 A.C. 688

(2) It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court will if necessary take the point, since it relates to a matter of public policy, and the Court does not enforce arrangements which are contrary to public policy.

Wyatt v.
Kreglinger,
[1933]
1 K B. *per*
Scrutton,
L.J., at
p. 806

(3) A restraint can only be justified if it is reasonable,

(a) in the interests of the contracting parties, and

(b) in the interests of the public.

(4) The onus of showing that a restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee. The onus of showing that, notwithstanding that a covenant is reasonable as between the parties, it is nevertheless injurious to the public and therefore void, rests upon the party alleging that it is so; and it has been said that, 'if once the Court is satisfied that the restraint is reasonable as between the parties, the onus will be no light one'.

Morris v.
Saxelby,
per Lord
Atkinson,
at p. 700

Reasonableness, however, as a test for the validity of a restraint requires further elucidation.

A G of
Australia
v Adelaide
S.S. Co.,
[1913] A.C.
at p. 797
NW Salt
Co v
Electrolytic
Alkali Co.
[1914] A.C.
at p. 472

The restraint must be reasonable not only in the interests of the covenantee, but of both parties. At first sight it might appear that any restraint, since it protects the covenantee alone, must be opposed to the interests of the covenantor, but if the transaction is regarded as a whole this is clearly not so. If the vendor of a business could not covenant not to compete with the person to whom he sells it, his business would command a lower price; if an employee could not bind himself not to convey trade secrets to his employer's rival, he might find it difficult to secure training for a career or employment of trust. 'As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his [i.e. the covenantor's] interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing.'

Morris v.
Saxelby,
per Lord
Parker, at
p. 707

Further, the test of reasonableness is the same for both *ibid.*

parties. The Court will not 'weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint'; in other words, it will not consider the *adequacy* of the consideration which he has received. It is reasonable that the covenantee should demand, and it is equally reasonable that the covenantor should subject himself to, a restraint which affords adequate, but not more than adequate, protection to the covenantee.

The application of this test will depend on the answers to two questions: what is it that the covenantee is entitled to protect, and against what is he entitled to protect it?

In the *Nordenfelt* case Lord Macnaghten suggested that greater freedom of contract was allowable in a covenant between the buyer and seller of a business than in one between master and servant. This distinction has been developed in later cases, especially in those of *Mason* and *Morris*, and it may now be regarded as established that a covenant against competition entered into by the seller of a business, if confined to the area within which competition would probably injure the buyer in the business sold, is reasonable, though even in this case a covenant against *mere* competition which is not necessary to render the sale of the business effective will not be upheld, for a man's 'liberty to trade is not an asset which the law will permit him to barter except in special circumstances within well-recognized limitations'. On the other hand, a covenant by an employee not to compete with his employer after the relation of master and servant has ceased is, in general, not reasonable. The ground of this distinction is thus explained by Lord Shaw:

Vancouver
Malt Co.
Ltd v
Vancouver
Breweries
Ltd, [1934]
A.C. 181

Morris v.
Saxelby,
at p. 713

'When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so

would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure.

In the case of restraints upon the opportunity to a workman to earn his livelihood a different set of considerations comes into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energies and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand, from being deprived of the opportunity of earning his living, and in preventing the public, on the other, from being deprived of the work and service of a useful member of society. In this latter case there is not a something already realized, made over to and for the use of another; but there is a something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large.'

In both cases, therefore, the principle upon which reasonableness is determined is the same, though the application is necessarily different. The covenantee is entitled to protect what belongs to him, but not to acquire by the covenant some advantage that does not. The buyer of a business owns a business which from the nature of the case has hitherto been immune from competition by the man who sells it to him; it is reasonable that he should be able to protect it. But no business is, as such, immune from competition by those who have been employed in it, and it is not reasonable that an employer should try to secure such an immunity for it. On the other hand, the assets of a business often include a trade connexion or trade secrets with which an employee, in the course of his employment, becomes acquainted, and which he would, if not restrained, be in a position to depreciate after the employment has terminated; it is reasonable that an employer should be able to protect established interests such as these by a covenant against the use by his employee of information confidentially obtained or against solicitation of his customers.

'The reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some pro-

Ibid., *per*
Lord Parker,
at p. 710

prietary right, whether in the nature of trade connexion or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of personal skill and knowledge acquired by the employee in his employer's business.'

It is, however, not always easy to say whether a covenant is directed to the protection of a trade connexion or only to the prevention of competition, for the two things may in certain circumstances be practically the same. Thus the House of Lords has upheld the validity of a covenant, unlimited in point of time, in which one who had served for many years as a solicitor's clerk agreed with his employer not to practise as a solicitor within seven miles of Tamworth. It was pointed out that a solicitor's managing clerk must in the course of his duties acquire a knowledge of the affairs and of the clients of the business which puts him in a position in which, if not restrained, he might gravely impair the goodwill of his employer's business; and the restriction was held to be not more than was reasonably necessary for protecting this.

Cases in which a restraint which is reasonable as between the parties has been held void as not being reasonable in the interests of the public are not common.

Fitch v
Dewes,
[1921]
2 A.C. 158

A contract calculated to produce 'a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent' would apparently be unreasonable in the interests of the public, but the case of *North Western Salt Co. v. Electrolytic Alkali Co.* shows that in practice it is not easy to invalidate a contract on this ground, since, as Lord Haldane there pointed out, a combination to regulate supply and to keep up prices is not necessarily disadvantageous to the public.

A G. of
Australia v
Adelaide S S
Co., [1913]
A.C. *per*
Lord Parker,
at p 796

[1914] A.C.
461

English Hop
Growers Ltd.
v. Dering,
[1928]
2 K.B. 174

A statutory example of an agreement which may well be reasonable as between the parties but is against the public interest exists under the Auctions (Bidding Agreements) Act, 1927, by which the agreement known as a

'knock-out', that is to say, an agreement between dealers at an auction that, in order to avoid competition, only one of them shall bid, and that the goods, if bought, shall be divided between them, is declared a punishable offence.

Usually the party complaining of a restraint of trade is the party whom it restrains, but the case of *Joseph Evans & Co. v. Heathcote* shows that even a party who receives the benefit of the restraint is not debarred from setting up its unreasonableness. The plaintiffs were members of a price-regulating trade combination called the 'Cased Tube Association', the rules of which regulated the output of the members and provided that a member whose output in any month exceeded that permitted to him should pay the profits of the excess into a pool, and that a member whose output fell below that permitted should be entitled to receive a certain sum out of the pool. Some of the rules of the Association were in unreasonable restraint of trade; in particular, members were not to sell except to five named firms who were under no obligation to buy from them, and there was no power to withdraw from the agreement. In an action by the plaintiffs to recover money due to them from the pool it was held that the defendants, who were the other members of the Association, and therefore the very persons who had received the benefit of the restraint to which the plaintiffs had submitted, might rely on the invalidity of the contract in resisting payment. The plaintiffs succeeded in the action on another ground, but they could not succeed under the contract.

Stipulations in a contract which impose restrictions on personal liberty in general appear to be governed by the same principles as those which restrict the liberty to trade. A clerk made a contract with a moneylender the effect of which (as the Master of the Rolls observed) was almost to reduce him to the status of a villein, *adscriptus glebae*. The contract was held void as improperly fettering the clerk's personal liberty and the free disposal of his labour. So, too, an agreement which would deprive a debtor of his

[1918]
1 K.B. 418

Restraint
of personal
liberty

Horwood
v. Millar's
Timber Co.,
[1917]
1 K.B. 305

King v
Faraday,
[1939]
2 K.B. 753

Denny's
Trustee v.
Denny,
[1919]
1 K.B. 583

whole available income in circumstances in which he was prevented from achieving any other source of income has been held void on grounds of public policy. With these cases may be usefully compared another in which a spendthrift covenanted with his father, who had paid his debts, not to live within a certain distance of London or to go there without his father's written consent. His freedom and liberty of action were in the circumstances held to be reasonably restricted for his own good, and the contract was valid.

§ 2. *Effect of Illegality upon Contracts in which it exists*

What is
the effect
of ille-
gality ?

It has already been pointed out that the borderline between illegal and merely void contracts is not altogether clear, probably because, the contract being a nullity between the parties in either case, the Courts are not always concerned to distinguish between them. But there are three cases in which it seems certain that a contract is illegal and not merely void, namely, if its object is forbidden by Statute, or constitutes an offence or a civil wrong at Common Law, or is contrary to good morals, but the only aspect of immorality to which the Courts have attached the stigma of illegality is sexual immorality. It is not thought that all contracts which are contrary to public policy, for example, a contract in unreasonable restraint of trade, can properly be described as illegal.

The fundamental principles upon which the Courts will act when they have to deal with an illegal contract were long ago explained by Lord Mansfield:

Holman v.
Johnson, 1
Cowp at
P 343

'The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi*

causa, or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.'

The decision of the Court of Appeal in *Harry Parker Ltd. v. Moon* provides a modern illustration of this fundamental principle. [1940]
2 K.B. 590

(1) *Severability of an illegal or void contract*

The same contract may contain both legal and illegal or void terms; and in such a case we have to consider whether the legal parts of the contract may be severed from the others and enforced, or whether the whole contract is bad.

Formerly the judges, fearing lest statutes might be eluded, drew a distinction in this matter between illegality by statute and illegality at Common Law, and they laid it down that 'the statute is like a tyrant, where he comes he makes all void, but the Common Law is like a nursing father, makes only void that part where the fault is and preserves the rest'.

Maleverer v. Redshaw,
1 Mod. 35

This distinction, however, no longer exists, and the rule in its modern form may be thus stated:

'Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or Common Law, you may reject the bad part and retain the good.'

Per Willes, J., in Pickering v. Ilfracombe Railway,
L.R. 3 C.P. 250

But the application of this rule is not easy, for it does not indicate the circumstances in which we may or may not sever from one another the legal and illegal parts of a contract.

One point, however, is clear. If any part of the *consideration* for a promise is illegal, that promise cannot be enforced. There can be no severance of the legal from the illegal part of the consideration.

Lound v. Grimwade,
39 Ch. D. 605

Difficulty arises, however, where a legal consideration supports promises some of which are legal and others illegal. In such a case there is authority for saying that the legal promises are not made void merely because the promisor has made other promises in the same contract which are illegal. This is an old rule and is set forth in Coke's Reports. 'That if some of the Covenants of an Indenture or of the conditions endorsed upon a bond are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good.'

Pigot's
Case, 11
Co. Rep.
27 b

There are modern dicta which seem to support the principle here laid down:

Kearney v
Whitehaven
Colliery Co.,
[1893]
1 Q B at
p 711

'If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration; then upon that valid consideration may be several promises or liabilities. If any one of these be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration.'

None the less it is not easy to find a clear modern application of the rule, at any rate in cases where the illegality in the contract is of a kind involving moral turpitude; and it seems improbable, for example, that the Courts would permit the severance of a legal promise from a promise to do a criminal or sexually immoral act contained in the same agreement and supported by the same consideration. In fact most of the modern cases on the severability of promises have arisen on contracts in restraint of trade.

Even in these cases the proper test of severability is not free from doubt, for the cases show some divergence of judicial opinion.

Nevanas v.
Walker,
[1914]
1 Ch. 413

In many of these cases the test suggested is to ask whether the parties have made a clear severance for them-

selves in the contract so that the covenant in restraint of trade may be said to be substantially equivalent to two or more separate covenants. This view is expressed in the following passage from the judgment of Salter, J., in *Putsnam v. Taylor*:

[1927]
1 K.B. at
p 639

‘The doctrine of severability is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise, notwithstanding the fact that the promisor has made other promises, supported by the same consideration, which are void, and has included the valid and invalid promises in one document. But if the promise sought to be enforced is invalid, as being in undue restraint of trade or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made but did not make. The promise to be enforceable must be on the face of the document a separate promise. . . . Whether it is separate or not depends on the language of the document. Severance, as it seems to me, is the act of the parties, not of the Court.’

But even the acceptance of this rule does not solve all the difficulties of the question. In *Attwood v. Lamont* both Lord Sterndale, M. R., and Younger, L. J., accepted the test of asking whether the covenant can be considered as being in effect a number of separate covenants, but they differed in its application.

[1920]
3 K B 571

In Lord Sterndale’s view it would admit what is sometimes called the ‘blue pencil’ rule; ‘severance can be effected when the part severed can be removed by running a blue pencil through it’ without affecting the meaning of the part remaining. The ‘blue pencil’ rule in practice may be seen in the case of *Goldsoll v. Goldman* where the vendor of a business had covenanted not to deal ‘in real or imitation jewellery’ in the United Kingdom or in a number of specified foreign countries. As the plaintiff’s business was in imitation jewellery only, this covenant was unreasonably wide, and it was also too wide in area. The Court struck out the words ‘real or’, and the references to foreign countries, and enforced the covenant as thus cut down.

at p 578

[1915]
1 Ch 292

[1920]
3 K.B.
at p. 593

Ante, p. 226

Younger, L. J., on the other hand, in a judgment in which Atkin, L. J., concurred, explicitly rejected the 'blue pencil' rule. He pointed out that since the establishment by the cases of *Mason v. Provident Clothing Co.* and *Morris v. Saxelby* of the principle that *all* restraints of trade are *prima facie* invalid, earlier decisions on severance, in which the courts acted on the view that restraints being *prima facie* valid it was their duty to bind the covenantor to them as far as was permissible, had become obsolete. They were at any rate no longer safe guides in covenants between employer and employee, though perhaps still applicable to those between vendor and purchaser, for in these the change in the law as previously understood had been little more than a matter of words. He cited with approval the following remarks of Lord Moulton in *Mason v. Provident Clothing Co.*

[1913] A.C.
at p. 745

'I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of *trivial importance, or merely technical, and not a part of the main purport and substance of the clause*. It would, in my opinion, be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might have validly required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation in which the servant is usually at a great disadvantage in view of the longer purse of his master.'

The stricter view of Lord Moulton and Younger, L. J., cannot yet be said to be accepted as the law. But the reasoning on which it is based is cogent, and, especially in the case of covenants between employer and employee which, as Younger, L. J., points out, are often 'printed documents, prepared beforehand for signature by every future employee, irrespective of the nature of his employment or his personal qualifications', there is every reason why Courts of Law should not be astute in severing the reasonable from the unreasonable parts of restrictive provisions.

(2) *The intention of the parties*

Where the object of the contract is an unlawful act the contract is void, though the parties may not have known that their act was illegal or intended to break the law.

But if the contract admits of being performed, and is performed, in a legal way, the intention of the parties may become important; for if they did not intend to break the law, and the law has not in fact been broken, money due under the contract will be recoverable even though the performance as originally contemplated would have involved a breach of the law.

Morris chartered a ship belonging to Waugh to take a cargo of hay from Trouville to London. It was subsequently agreed that the hay should be unloaded alongside ship in the river, and landed at a wharf in Deptford Creek. Unknown to the parties an Order in Council (made before the charter-party was entered into) had forbidden the landing of French hay. Morris, on hearing this, took the cargo from alongside the ship without landing it, and exported it, thus avoiding a breach of the Order in Council. The vessel was delayed beyond the lay-days,¹ and Waugh sued for damages arising from the delay. Morris set up as a defence that the contract (viz. the charter-party) contemplated an illegal act, the landing of French hay contrary to the Order in Council. But the defence did not prevail:

'Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so the knowledge of what the law is becomes of great importance.'

There is another case in which the intention of the parties may be important. A contract may be tainted with illegality in two different ways. It may contain a promise to do something which is illegal in itself; or it may contain one to do something which is innocent in itself, but which

Intention is immaterial;

Re Mahmoud and Ispahani, [1921] 2 K B 716

Waugh v. Morris, L R 8 Q B. 202

Under 32 & 33 Vict. c. 79. s. 78

unless contract can be and is legally performed;

at p. 208

or unless illegal intent is of one only

¹ For an explanation of this term see Appendix A.

one of the parties intends to use for the furtherance of some ulterior illegal purpose.

Rights of
innocent
party
to sue,
to avoid
L.R. 1 Ex.
213

In the latter case if the other party knows nothing of the illegal purpose throughout the transaction, he is entitled to recover what may be due to him on the contract. If the plaintiff in *Pearce v. Brooks* had known nothing of the character of his customer, it cannot be supposed that he would have been unable to recover the hire of his brougham.

If the innocent party becomes aware of the illegal purpose of the transaction before it is completed or while it is still executory he may refuse to perform the contract, and may also presumably recover any damages that he may have suffered through its not being performed.

Cowan v.
Milbourn,
L R 2 Ex.
230

Milbourn let a set of rooms to Cowan for certain days; then he discovered that Cowan proposed to use the rooms for the delivery of lectures which were unlawful because blasphemous within the meaning of 9 & 10 Will. III. c. 32; he refused, and was held entitled to refuse, to carry out the agreement.¹

How
affected
by know-
ledge

If, however, the innocent party to the contract discovers the illegal purpose before it is carried into effect, he could not recover on the contract if he allowed it to be performed none the less. The defendant in *Cowan v. Milbourn* could not have recovered the rent of his rooms, if, having let them in ignorance of the plaintiff's intentions, he had allowed the tenancy to go on after he had learned the illegal purpose which his tenant contemplated.

(3) *Can a man be relieved from a contract which he knew to be unlawful?*

Illegality
known at
the time,
no ground
for avoid-
ance,

It remains to consider whether a party to an illegal contract can under any circumstances make it a cause of

¹ So far as *Cowan v. Milbourn* decided that the lectures intended to be given were blasphemous within the meaning of 9 & 10 Will. III. c. 32 and therefore unlawful, it is overruled by *Bowman v. Secular Society*, [1917] A.C. 406; but its authority for the principle stated in the text is not affected.

action. The rule is clear that a party to such a contract cannot come into a Court of Law and ask to have his illegal object carried out; nor can he set up a case in which he must necessarily disclose an illegal transaction as the groundwork of his claim; and this rule holds although neither party had any intention of breaking the law. The rule is expressed in the maxim, '*in pari delicto potior est conditio defendentis*'.

Taylor v. Chester, L R. 4 Q B. 309
Harse v. Pearl Life Assurance Co., [1904] 1 K.B. 558
Berg v. Sadler, [1937] 2 K.B. 158

But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into four classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect before it is sought to recover the money paid or goods delivered in furtherance of it; (4) the defendant may stand to the plaintiff in a fiduciary relation, as agent or trustee.

unless plaintiff be not *in pari delicto*,

(a) The Moneylenders Acts, 1900 to 1927, illustrate the first class of cases. A contract made with a moneylender who has failed to register himself under the Acts is illegal and void. The lender cannot therefore recover the money lent; but since the Acts were passed for the protection of persons dealing with moneylenders, the borrower, though he has entered into an illegal contract, can recover securities placed in the hands of the lender; though he may be put on terms as to the repayment of the money borrowed.

Bonnard v. Dott, [1906] 1 Ch. 740.
Lodge v National etc Co., [1907] 1 Ch. 300

(b) Two decisions illustrate the second class. In *Reynell v. Sprye* Sir Thomas Reynell was induced, by the fraud of Sprye, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the Court was satisfied that he had been induced to enter into the agreement

1 D M. & G. 660

by the fraud of Sprye, and considered him entitled to relief.

6 H. & N.
778.
7 H. & N.
934.

In *Atkinson v. Denby*, the plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. Denby was an influential creditor, whose acceptance or rejection of the offer might determine the decision of several other creditors. He refused to assent to the composition unless Atkinson would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and Atkinson sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, observed—

‘It is said that both parties are *in pari delicto*. It is true that both are *in delicto* because the act is a fraud upon the other creditors; but it is not *par delictum*, because one has power to dictate, the other no alternative but to submit.’

or there
is *locus*
poeniten-
tiae

(c) The third exception relates to cases where money has been paid, or goods delivered, for an unlawful purpose which has not been carried out.

The law is not quite satisfactorily settled on this point, but its present condition may be thus stated.

1 Q B D.
291, 300

In *Taylor v. Bowers* it was said by Mellish, L. J., that—

‘If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out: but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action.’

The case to which these words applied was one in which a debtor had made a fictitious assignment of goods in fraud of creditors; the contemplated fraud was not carried out and the debtor desired to recover his goods from one to whom they had been subsequently transferred under a bill of sale; and it was held that he was entitled to do so. It is, however, difficult to say that the fictitious assignment was anything but a part-performance of the illegal purpose; and it may

be doubted whether the principle as stated in *Taylor v. Bowers* was correctly applied to the facts in that case.

Subsequent cases bear out this view. In *Kearley v. Thomson*, Messrs. Thomson, a firm of solicitors acting for the petitioner, creditor of Clarke, a bankrupt, agreed with Kearley, a friend of Clarke, that in consideration of the payment of their costs they would not appear at the public examination of Clarke, nor oppose the order for his discharge. They carried out the first part of the agreement, but before any application was made for Clarke's discharge, Kearley sought to recover the money which he had paid, on the ground that it was consideration for a promise to prevent the course of justice and that the contract was not wholly carried out. The Court of Appeal held that he could not recover. The extent of the application of the principle laid down by Mellish, L. J., in *Taylor v. Bowers*, and even the principle itself, might, said the Court, require consideration. In any case there could be no recovery where the illegal purpose, as in the case before the Court, had been *partly* carried into effect.

Cases of
part-per-
formance
of unlaw-
ful con-
tract
24 Q B D
742

So also in another case a man procured another to go bail for him on the terms that he deposited the amount of the bail in the hands of his surety as an indemnity against his possible default. He sued his surety for the money on the ground that his contract was illegal, that no illegal purpose had been carried out (since he did not fail to appear), that the money was still intact, and that he could recover it. The Court of Appeal held that the illegal object was carried out when, by reason of the plaintiff's payment to his surety, the surety lost all interest in seeing that the conditions of the recognizance were performed.

Herman v. Jeuchner, 15
Q B D 361

Thus it appears that the true rule is that at least where a part-performance of the illegal purpose has taken place, money paid or goods delivered in pursuance of it cannot be recovered back. But we must note that marriage brokerage contracts (though it is not easy to see why it should be so) constitute an exception to the rule.

Alexander v. Rayson,
[1936]
1 K.B. 169

Marriage
brokerage
con-
tracts

[1905]
2 K.B. 123

In *Hermann v. Charlesworth* a lady paid money to the proprietors of a newspaper with a view to obtaining by advertisement an offer of marriage. After advertisements had appeared, but before any marriage had been arranged, she brought an action to recover the money. It was argued on behalf of the defendant that, inasmuch as the contract had been in part performed, the action could not be maintained. But Collins, M. R., said:

1 Ves Sen
503

‘There was no objection at Common Law, till perhaps a hundred years ago, to such contracts; but the Courts of Equity took a different view, and in consequence the Courts of Common Law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered when there had been a total failure of consideration. As was pointed out by Lord Hardwicke in *Cole v. Gibson*, Equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place.’

On this ground, therefore, that the Common Law, in taking over the equitable rule against marriage brokerage contracts, had taken it over in the form in which Equity had developed it, the plaintiff was held entitled to recover the money she had paid.

(d) An agent or a trustee will not be allowed to retain property or to refuse to account for moneys received on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction.

1 B. & P 296

An extreme case which illustrates this principle is the old case of *Farmer v. Russell*. The defendant had been engaged by the plaintiff to dispose on commission of counterfeit halfpence to sailors in Portsmouth and having done so had failed to account for the proceeds. The plaintiff succeeded, and language has been used in the Court of Appeal which seems to assume that the case is still good law.

Rawlings v.
Gen. Trad-
ing Co.,
[1921] 1 K.B.
at p. 646

‘In such a case there was no illegality’, said Scrutton, L. J., ‘between plaintiff and defendant; the defendant was saying that the money had come to him as the proceeds of an illegal contract, and therefore one of the parties to the contract could not claim it from him, though the other party did not object to its being paid

over. The case appears quite different when the unenforceability is in the direct contract between the plaintiff and the defendant, not in a collateral contract under which the defendant had received the money.'

(4) *Comparative effects of illegality and avoidance*

We have mentioned the difficulty of distinguishing between illegal and merely void contracts. We now have to consider what difference of effect the distinction produces.

As between the original parties themselves the contract is a nullity in either case. But 'no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act', and these words of Lord Mansfield seem to provide us with the clue to the distinction. They do not mean only that no Court will *enforce* an illegal contract, for that would be equally true of a void contract. They mean also that, whatever kind of relief a man may be seeking, the Court will not assist him if in order to make out his case he is obliged to rely on an illegal transaction to which he has been a party.

Hyams v. Stuart King is a case which, it seems, would have been decided otherwise than it was if wagers had been illegal in our law, instead of being, as we have seen that they are, only void. In that case the defendant was indebted to the plaintiff as a result of certain betting transactions and desired time in which to pay. The Gaming Act, 1845, would have been a defence to legal proceedings for the debt, but on the plaintiff threatening to declare the defendant a defaulter, the defendant promised to pay in a few days, if the threat were not carried out. On this new promise and consideration he was held liable.

[1908]
2 K B. 696

'There is certainly nothing illegal', said Farwell, L. J., 'in paying or receiving payment of a lost bet: it is one thing for the law to refuse to assist either party in their folly, if they will bet; it is quite another to forbid the loser to keep his word.'

[1908]
2 K B
at p. 725

It was argued on the defendant's behalf that the original transactions between himself and the plaintiff were illegal, and that the promise to pay, even if based on a new con-

sideration, was tainted with the illegality of the wager out of which it arose ; but the majority of the Court of Appeal held that as the wager was only void no taint of illegality affected the subsequent promise of the defendant. The force of this decision, which, however, is believed to be repeatedly invoked in betting circles, is weakened by the strong dissenting judgment of Fletcher Moulton, L. J., who thought that the alleged new contract was only colourable, and that the promise on which the defendant was sued was in reality a promise to pay the bet and therefore void under the Act of 1845.

Potelakhoff
v. Teakle,
[1938]
2 K. B. 816

It is clear that the Courts are not prepared to extend the principle of *Hyams v. Stuart King*, and the question of its correctness is no doubt open to the House of Lords. The threat by which the new promise is extorted in such cases cannot be far removed from the criminal offence of blackmail.

Again, before the Gaming Act, 1892, altered the law, the ordinary relations of employer and employed held good as between employer and betting commissioner¹, including the ordinary liability of an employer to indemnify the person whom he employed against loss or risk, which might accrue to him in the ordinary course of the employment, though the employment was to make void contracts.

¹³ Q.B.D.
779.

In *Read v. Anderson*, therefore, the employer was compelled to repay the commissioner money expended by him in discharging bets owing by his employer, even though the latter had revoked his authority to do so ; for had the commissioner not discharged them, he would have been posted as a defaulter and would have lost his business ; and against this risk his employer was bound to indemnify him.

¹⁴ Q.B.D.
460

On the same principle *Seymour v. Bridge* was decided. An investor employed a broker to buy shares for him according to the rules of the Stock Exchange. The Stock Exchange enforces among its members, under pain of

¹ So far as concerns the recovery of winnings received by a betting agent they still do: *supra*, p. 213.

expulsion, agreements made in breach of Leeman's Act, under which a contract for the sale of bank shares is avoided where the contract does not specify their numbers or the name of the registered proprietor. Bridge knew of the custom, but endeavoured to repudiate the purchase on the ground that it was not made in accordance with the terms of the Statute. The case was held to be governed by *Read v. Anderson*. The employer is bound to indemnify the employed against known risks of the employment. If the risks are not known to both parties, and might reasonably be unknown to the employer, he is not so bound. Thus where an investor did not know of the custom, he was held, under circumstances in other respects precisely similar to those of *Seymour v. Bridge*, not to be bound to pay for the shares.

30 & 31 Vict.
c. 29

Perry v.
Barnett,
15 Q.B.D.
388

Another case in which it may be material to inquire whether a contract is illegal or only void occurs when a negotiable instrument has been given as security for its performance. Whether the contract is illegal or void, the instrument is, as between the immediate parties, void. But, as we shall see when we deal with the subject of negotiability in a later chapter, a negotiable instrument may pass into the hands of a third party, and that party's rights will differ according as the contract in respect of which it was given was illegal or void.

If the instrument is made and given to secure payment of money due or about to become due upon an *illegal* transaction, a subsequent holder loses the benefit of the rule as to negotiable instruments to the effect that consideration is presumed till the contrary is shown: he must show that consideration has been given either by himself or by some intermediate holder, and that he knew nothing of the illegality, before he will be entitled to recover.

Right of
subse-
quent
holder

But if the instrument is given to secure payment of money due or about to become due upon a *void* transaction, although the instrument is void as between the immediate parties, a subsequent holder is not prejudiced by the fact

that the original transaction is void, and consideration will be presumed in his favour.

Fitch v. Jones, 5 E. & B. 245

A promissory note was given in payment of a bet made on the amount of the hop duty in 1854. The bet was void by the Gaming Act, 1845, and the Court was clear that as between the original or immediate parties the note was void also. There was no liability to pay the lost bet; and therefore no consideration for the note given to secure its payment. The action, however, was brought by the indorsee of the note, and the main question for the Court was whether the plaintiff was bound on proof of the origin of the note to show that he had given consideration for the note, or whether it was for the defendant to show that he had given none. The note being given, not on an illegal, but on a void. consideration, the Court held that the onus was not on the plaintiff.

Supra, p. 211

Tatam v. Haslar, 23 Q B D 349

Lilley v Rankin, 56 L J Q B 248

The result would, however, have been different if the note had been given in respect of a wager on a 'game or pastime' for, as we have seen, the effect of the Gaming Act, 1835, is that such a security is deemed to be given for an illegal consideration.¹ The taint of illegality affects a subsequent holder, who must show that consideration has subsequently been given for the security, and may still be disentitled to recover, unless he also proves that he knew nothing of the illegality of its origin. If, on the other hand, the security is given in respect of a wager *not* on a game or pastime, it is immaterial whether a subsequent holder for value knows the circumstances of its origin or not.

Lastly, it seems probable that we ought to recognize a distinction between illegal and void contracts in the matter of the right to demand restitution of money paid or goods delivered under the contract. We have already seen that,

Supra, p 238

¹ It will be remembered that the earlier Act of Anne had made it wholly void, and thus an innocent indorsee for value might be seriously prejudiced. This same hardship will also, by reason of s. 5 of the Betting and Loans (Infants) Act, 1892, affect the bona-fide holder of a security given by a person in respect of an agreement to pay a loan contracted by him during infancy and void in law.

apart from certain exceptional cases, a man cannot recover money paid or goods delivered in pursuance of an illegal contract. On the other hand, he may be able to do so if the payment has been made under a contract which was void without being also illegal. He cannot do so in every case, and we shall have to consider the limits of this right to restitution in a later chapter. For instance, there is no doubt that one who has lost a bet and paid it cannot recover what he has paid, even though the bet was only void; but what disables him from recovering in that case is not the fact that he is obliged to disclose the fact that he has made a contract which the law declares to be void. His action would fail, but it would not arise *ex turpi causa*. It would fail because the payment would have been made voluntarily in discharge of an obligation known not to be binding, and accordingly he would be unable to show any cause why he should recover it. *Infra*, p. 430

(5) *Contracts lawful where made but unlawful in England*

We have seen that a contract, valid according to its 'proper law', is actionable in the Courts of this country. So far does this rule go that a contract for the purchase and delivery of slaves, made, and to be performed, in Brazil, was held in 1860 (two judges dissenting) to be actionable in England on the ground that the contract was lawful in the place where it was made and was not prohibited by the statutes relating to slave-trading then in force. *Supra*, p. 114

But the judges who took this view stated that if the transaction 'was an offence against the laws here', if it was 'by Act of Parliament prohibited', it could not be enforced, even though the other contracting party might by the laws of his country enter into it. No suggestion was made that slavery was an offence against morality, so grave that no dealings concerned with the purchase or delivery of slaves could be considered in English Courts. But it may well be that the case would now be decided differently by an English Court. Santos v. Illidge,
8 C.B., N.S.
861
p. 868
p. 874

There is, however, ample authority to show that other conditions may exist, short of statutory prohibition, which will prevent our Courts from enforcing a contract even though it may be valid by its proper law.

Foster v.
Driscoll,
[1929]
1 K.B. 470

An English Court will not enforce a contract which is illegal by the law of the country in which it is to be performed.

8 De G. M.
& G. 731

In *Hope v. Hope* an agreement was made in France for obtaining a divorce by collusion. The divorce proceedings were to take place in this country.

16 C.B., N.S.
73

In *Grell v. Levy* an agreement, also made in France, provided for the recovery, by an attorney practising in England, of a debt for his client half of which he was to retain for himself.

In each case the English Court declined to enforce the agreement. It should be noted that in each case the agreement was to be performed in this country, and that the one involved an interference with the course of justice, while the other not merely contemplated champerty, but was made by an officer of the Courts of this country.

[1900]
2 K.B. 208

at p. 232

On the other hand, in *Saxby v. Fulton*, it was held that money lent for gaming at Monte Carlo, where gaming was lawful, could be recovered in England, because the various English statutes only 'show that the policy of the Legislature is to deal in a disciplinary fashion with certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transaction connected with betting or games of chance'. But the lender of money for the purpose of gaming cannot sue on a *cheque* given for money lent abroad, if the cheque is one payable in England, for in that case the cheque is governed by English law, and by the Gaming Act, 1835, the cheque must be deemed to be given on an illegal consideration.¹

Moulis v.
Owen,
[1907]
1 K.B. 746

¹ The present state of the law on this subject is indefensible. As the authorities stand it seems that if the transaction takes place abroad, an action will lie in England on the consideration (*Saxby v. Fulton*); it will not lie on a cheque (*Moulis v. Owen*); but if a cheque has been

Nor again will an English Court enforce a contract, though valid by its proper law and by the law of the place where it is to be performed, which offends against English ideas of public policy. Such a case was *Kaufman v. Gerson*. *Ante*, p. 196. The husband of Mrs. Gerson, the defendant, living in France, had there appropriated to his own use money entrusted to him for other purposes, and was liable to criminal proceedings by French law. Kaufman threatened to prosecute, and Mrs. Gerson promised him a sum of money in consideration of his refraining from the course which he threatened. [1904] 1 K.B. 591

Such an agreement was valid by French law, but the Court of Appeal held that money due under it was not recoverable in this country because the moral pressure brought to bear upon the wife to compromise proceedings which would have brought discredit on her husband conflicted 'with what are deemed to be in England essential public or moral interests'.

It is true that an agreement obtained by moral pressure of the sort here exercised would not hold good if made in England and with the object of stifling an English prosecution; but the criminal proceedings which were compromised by the agreement in question were proceedings in the French Courts, though the balance of the sum agreed to be paid was sought to be recovered here. It seems, however, that the English Courts will in all cases reserve to themselves the right to decide whether the conduct of a plaintiff is such as to disentitle him to enforce a contract alleged to have been obtained by unfair means, whatever may be the view of a foreign law upon the subject. Williams v. Bayley, L.R. 1 H.L. 200

given, it may be disregarded and an action brought on the consideration (*Société Anonyme des Grands Établissements v. Baumgart* (1927), 96 L. J. (K.B.) 789). If the transaction takes place in this country an action will not lie either on the cheque or on the consideration, for by implication the Act avoids the latter also (*Carlton Hall Club v. Laurence*, [1929] 2 K.B. 159).

PART II

THE OPERATION OF CONTRACT

WE come now to deal with the effects of a valid contract when formed, and to ask, To whom does the obligation extend? Who have rights and liabilities under a contract?

And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

In answer to these questions we may lay down two general rules.

(1) At Common Law no one but the parties to a contract can be bound by it, or entitled under it.

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either (*a*) by act of the parties, or (*b*) by rules of law operating in certain events.

CHAPTER IX

The Limits of the Contractual Obligation

§ 1. *A man cannot incur liabilities under a contract to which he was not a party*

Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third person.

This question has arisen more than once out of attempts to impose conditions on the resale of goods for the purpose of maintaining their price. In *M^cGruther v. Pitcher* the licensee of the owner of a patent manufactured articles under his licence, and pasted inside the lid of each box in which the article was sold a printed slip, stating that it was a condition of sale that the article was not to be resold at less than a specified price, and that 'acceptance of the goods by any purchaser will be deemed to be an acknowledgement that they are sold to him on these conditions and that he agrees with the vendors to be bound by the same'. A purchaser of the articles from an agent of the manufacturer retailed them at less than the specified price, and the manufacturer sought to restrain him from doing so. It was held that the action failed because the manufacturer could not show that any contract existed between himself and the retailer.

Contract
cannot
impose
liability
upon a
third
party

[1904]
2 Ch. 306

The plaintiff in *M^cGruther v. Pitcher* was not a patentee claiming an injunction to restrain an infringement of his patent, but merely a person who had a licence to manufacture and sell a patented article. It was therefore necessary for him to rely on the ground that he had purported to attach a condition to the resale of the goods, and that the defendant knew of this condition when he bought them. But, as was said by Romer, L. J., 'a vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that

every subsequent purchaser of the goods is bound to comply with the condition, so that if he does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions run with goods.' If the plaintiff had been the patentee, he might have succeeded in enforcing the condition, but on a ground that is not part of the law of contract. A patentee has by statute the sole right to make, use, exercise, and vend his invention; and no other person has a right to sell the patented article except under licence from him, and subject to any conditions which he may have attached to the licence. 'Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods.'

Ibid., per
Coxens-
Hardy,
L. J., at
p. 312

There is no real conflict between the principle upon which the Court decided *M'Gruther v. Pitcher* and the decision of the Judicial Committee of the Privy Council in the case of the *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, in which the following dictum of Knight Bruce, L. J., in *De Mattos v. Gibson* was approved and applied:

[1926]
A.C. 108

4 De G. & J.
at p. 282

'Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.'

In the *Strathcona* case the Dominion Co. had a long-term charter-party of a ship. The owners sold the ship to the Strathcona Co., who took it with notice of the charter-party, but pleaded that as there was no privity of contract between themselves and the Dominion Co. the charter-party was not binding upon them. The Judicial Committee pointed out that the Strathcona Co. thoroughly understood when they purchased the ship that the charter-party was to be

respected; 'this is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly *sub condicione*'. They proceeded to point out that the case fell under the doctrine long ago established with regard to the user of land by the case of *Tulk v. Moxhay*, and that whether the subject-matter be land or a chattel the principle is the same; 'the remedy is a remedy in Equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired'. They stated that the purchasers of the ship with notice of the charter-party were plainly in the position of constructive trustees with obligations which a Court of Equity would not permit them to violate, and granted an injunction restraining them from employing the ship in any way inconsistent with the employment provided for in the charter-party during its continuance.

Clare v. Theatrical Properties, (1936) 3 All E.R. 483

This decision, being one of the Privy Council, is not absolutely binding on the English Courts, and some remarks of Lord Greene, M. R., in the Court of Appeal, make it uncertain whether they would follow it. But as the Privy Council said, 'honesty forbids' that one who obtains a conveyance or grant *sub condicione* should violate the condition of his purchase to the prejudice of the original contractor, and it will be a matter for regret if our Courts should feel bound to hold that an injunction cannot be granted in such a case.

Greenhalgh v. Mallard, [1943] 2 All E.R. at p. 239

The *Strathcona* case is distinguishable from the class of case represented by *McGruther v. Pitcher* in the fact that the action was not brought by a vendor who had sold his property *out and out* and purported to have imposed something in the nature of a restrictive covenant on its user; it was brought by a party who, before the property was sold, had become entitled to a continuing interest in it. The distinction is vital; for whether it be the user of land or of a chattel that is in question, 'an interest must remain in the subject-matter of the covenant before a right can be con-

L.C.C. v. Allen, [1914] 3 K.B. 642

ceded to an injunction against the violation by another of the covenant in question'. Further, the relief asked for was merely an injunction to restrain the user of the property in a manner inconsistent with this pre-existing interest, subject to which the vendor had sold, and the purchaser had bought, the property; it was not an attempt to obtain specific performance, or damages for breach, of a contract, against a person not a party to such contract. The position of the purchaser was not unlike that of the assignee of the reversion on a lease, whose purchase of the land is necessarily subject to the existing lease.

28 L. J. Ch.
at p. 502

It should be added that both in *De Mattos v. Gibson* and in this case the chattel in question was a ship, which, as Lord Chelmsford points out, is 'a chattel of a peculiar value'. It is improbable that an injunction would be granted where the chattel is some ordinary article of commerce.

Inducing
breach
of con-
tract is
a tort

Lord Mac-
naghten, in
Quinn v.
Leathem,
[1901]
A.C. 495

Before leaving this subject we may note that although a contract cannot impose liabilities upon one who is not a party to it, yet the law imposes a duty on persons extraneous to the contract, not to interfere, without sufficient justification, with its due performance. For 'it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference'.

But the further consideration of this topic belongs to the law of tort rather than to that of contract.

§ 2. *A man cannot acquire rights under a contract to which he is not a party*

Contract
cannot
confer
rights on
a third
party

It is contrary to the common sense of mankind that *M* should be bound by a contract made between *X* and *A*. But if *A* and *X* make a contract in which *X* promises to do something for the benefit of *M*, all three may be willing that *M* should have all the rights of an actual contracting party; and there would be nothing startling if the law

should give effect to this desire. In many systems of law, indeed, this is the rule. It is not, however, the rule of the English Common Law.

Easton promised *X* that if *X* would work for him he would pay a sum of money to Price. The work was done and Price sued Easton for the money. It was held that he could not recover because he was not a party to the contract.

Price v.
Easton, 4 B.
& Ad. 433

The judges of the Queen's Bench stated in different forms the same reason for their decision. Lord Denman, C. J., said that the plaintiff did not 'show any consideration for the promise moving from him to defendant'. Littledale, J., said, 'No privity is shown between the plaintiff and the defendant.' Taunton, J., that it was 'consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between *X* and the defendant'; and Patteson, J., that there was 'no promise to the plaintiff alleged'.

It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case of *Tweddle v. Atkinson* is conclusive against this view.

Nearness
of kin to
promisee

1 B. & S. 393

M and *N* married, and after the marriage a contract was entered into between *A* and *X*, their respective fathers, that each should pay a sum of money to *M*, and that *M* should have power to sue for such sums. After the death of *A* and *X*, *M* sued the executors of *X* for the money promised to him. It was held that no action would lie. Wightman, J., said:

'Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure.

at p. 397

1 Ventr. 6

But there is no modern case in which the proposition has been supported. On the contrary, it is now established *that no stranger to the consideration can take advantage of a contract, although made for his benefit.*'

[1915] A.C.
847, 853

The rule was thus stated by Lord Haldane in the case of *Dunlop v. Selfridge*:

'In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.'

Supra, p. 251

This case, like that of *M'Gruther v. Pitcher*, arose out of a 'price maintenance' agreement, but the argument proceeded on somewhat different lines. In *M'Gruther v. Pitcher* the manufacturer sought to enforce price maintenance conditions against one who had entered into no contract to observe them; in *Dunlop v. Selfridge* the defendants had indeed contracted to observe the conditions, but they had done so, not with the plaintiffs, the manufacturers, but with another firm, Dew & Co., who had bought the goods from the plaintiffs and resold them to the defendants. Dunlops argued that in the contract which Dew & Co. had made with Selfridge, Dew & Co. had acted as their agents, but the House held that, even if the terms of the contract were consistent with that construction, Dunlops would still be unable to enforce it, since the facts of the case showed that no consideration had moved from them to Selfridge.

Supra, p. 92

Statutory
exceptions

There exist a few statutory exceptions to the rule that only a party to the contract can sue upon it, of which it is only necessary here to mention that created by § 36 of the Road Traffic Act, 1930. The person issuing a policy of insurance against third-party risks in accordance with the requirements of the Act is made liable to indemnify, not only the person taking out the policy, but 'the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover'.

Tattersall v.
Drysdale,
[1935]
2 K.B. 174

But in the passage which has already been cited from Lord Haldane's judgment in *Dunlop v. Selfridge*, it will be observed that he points out that while a *jus quaesitum tertio*¹ cannot arise 'by way of contract', it may be conferred 'by way of property under a trust'. We must consider, therefore, how far the strict rule of the Common Law is qualified by the equitable doctrine to which Lord Haldane refers.

The doctrine in Equity

The doctrine is that a party to the contract, either at the time when he enters into it or thereafter, may constitute a trust of a right to which he is entitled under the contract, in favour of a third party. By so doing he confers on the third party a right which is enforceable in Equity. Such a right arises, in Lord Haldane's phrase, 'by way of property', because, like the right of any other *cestui que trust*, it is a right in Equity to the *res* or property which is the subject of the trust, the *res* in this case being the contractual right, which at law is vested in the trustee, that is to say, in the party to the contract. It does not arise 'by way of contract', because the third party's right is not a right to enforce the contract directly, but a right to enforce the trust in his favour; and as with the enforcement of equitable rights in general, the person having the legal right in the thing demanded, in this case the contracting party who has constituted himself a trustee, must in general be a party to the action. 'The trustee can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as defendant.'

Performing Rights Society v. London Theatre of Varieties, [1924] A.C. at p. 14.
Vandepitte v. Preferred Accident Insurance Corp., [1933] A.C. at p. 79

In *Les Affrêteurs Réunis v. Walford Ltd.* the facts were these. It is usual for a charter-party to provide that a com-

[1919] A.C. 801

¹ The phrase is borrowed from Scots law. When a contract containing a stipulation in favour of a third party becomes irrevocable, as it may in Scotland either by the creation of a trust or in certain other ways, the right so acquired is termed a *jus quaesitum tertio*. (See Encyclopædia of the Laws of Scotland, vol. viii, p. 572.)

mission shall be payable to the broker by whom the charter is negotiated. The broker is not a party to the charter-party, and it is the practice for the charterer, if necessary, to sue the shipowner for the amount of the broker's commission *as trustee for the broker*. In the present case the action had been brought by the broker himself, but by consent it was treated as brought by the charterers as trustees for him. The House of Lords recognized the practice and gave judgment in his favour.

It is clear that this equitable doctrine creates an important qualification of the Common Law rule by which a contract can be enforced only by one who is a party to it. But it is not a very satisfactory device if the object of the law is to enable a stranger to the contract to enforce a right which a contracting party has intended to confer upon him. For from that point of view the procedure is unnecessarily cumbrous, and, moreover, it is not easy to define the circumstances in which the doctrine will be applied.

No special form of words is necessary to constitute a trust of a contract right, but, as the Privy Council has said, 'the intention to constitute the trust must be affirmatively proved'. Unfortunately when a person makes a contract of which he intends another to be entitled to the benefit, he may well be ignorant of the distinction between a right arising 'by way of contract' (which that person cannot acquire) and one arising 'by way of property under a trust' (which he can). A comparison between the cases of *Harmer v. Armstrong*, in which the Court of Appeal found that the defendant had entered into a contract as trustee for the plaintiffs and himself, and of *Vandepitte v. Preferred Accident Insurance Corporation of New York*, in which the Privy Council were not satisfied of the intention to create a trust, will illustrate the difficulty. It seems, therefore, to be desirable that the law should do directly, what it already does indirectly and imperfectly, that is to say, allow a contract to be enforced, subject to any necessary safeguards, by one

[1934] Ch.
65

[1933] A.C.
70

whom, though not a party to it, the contract is intended to benefit.¹

So far in this consideration of contracts under which a person not a party to the contract is to benefit we have been concerned with the position of this third party, and that is the aspect of such contracts with which the Courts have most often had to deal. But there are also some points of interest to be noted in such contracts as regards the rights of the parties themselves.

In *Re Schebsman* A had made a contract with a company ^{[1944] 1 Ch. 83} by which he had been employed whereby the Company undertook by way of compensation for loss of his employment to pay him certain annual sums, and, if he should die before the completion of the payments, to pay certain sums to his widow, and, if she should die, to his daughter. A died before the payments had been completed, having been adjudicated bankrupt shortly before his death; and thereupon his trustee in bankruptcy claimed that the moneys, which by the terms of the contract had now become payable to the widow, formed part of the debtor's estate. The claim failed. Though the widow could not herself have enforced the contract, it was both the right and the duty of the Company to pay the amounts to her

¹ In their Sixth Interim Report the Law Revision Committee has pointed out that the rule that consideration must move from the promisee is distinct from the rule that English law recognizes no *jus quaesitum tertio*, for a man may be a party to a contract and yet a stranger to the consideration. But in the majority of cases both rules unite to exclude a right of action. The Committee recommends that a promise shall be enforceable by the promisee though the consideration is given by or to a third party. *Supra*, p. 92

The Committee also recommends (i) that where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties, but that unless the contract otherwise provides it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct; and (ii) that a life, endowment, or education policy shall be enforceable by the person for whose benefit the policy is expressed to be issued subject to such provisions for the protection of creditors as are contained in s. 11 of the Married Women's Property Act, 1882. [Cmd. 5449.]

in accordance with its terms. Of course if there had been circumstances showing that she was to receive them as agent or as trustee for *A* or his estate, she could not have retained them if they had been paid to her, but the clear intention of the parties was that she was to have them for her own use. The parties themselves might have altered the terms of the contract by agreement without the widow's consent, but *A* alone could not have done so; he could not, for instance, have required the Company to pay the sums to himself or to his estate, without the Company's concurrence, and the trustee in bankruptcy was no more able to alter the terms of the contract than *A* would have been.

Attempts
to enable
a third
party to
sue for
many
joint con-
tractors
L.R. 5 C.P.
568
have uni-
formly
failed

Unincorporated companies and societies have sometimes tried to avoid the inconvenience of bringing action in the names of all their members by introducing into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Thus in *Gray v. Pearson*, the managers of a Mutual Assurance Company, not being members of it, were authorized, by powers of attorney executed by the members of the Company, to sue upon contracts made by them as agents on behalf of the Company. They sued upon a contract so made, and it was held that they could not maintain the action, 'for the simple reason—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure—that the proper person to bring an action is the person whose right has been violated'.

Per Willes,
J., at p. 574

Statutory
relaxa-
tions of
the rule

The inconvenience under which bodies of this description labour has been met in many cases by the Legislature. Certain companies and societies can sue and be sued in the name of an individual appointed in that behalf,¹ and the

¹ Statutes of this nature are—

7 Geo. IV. c. 46, relating to Joint Stock Banking Companies;
7 Will. IV. and 1 Vict. c. 73, relating to chartered companies;
34 & 35 Vict. c. 31, relating to Trade Unions;
59 & 60 Vict. c. 25, relating to Friendly Societies;

and in many cases companies formed by private Acts of Parliament possess similar statutory powers.

Rules of the Supreme Court, which are made under powers given by the Judicature Act, provide that

‘Where there are numerous persons *having the same interest in one cause or matter*, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such cause or matter on behalf or for the benefit of all persons so interested.’

Order XVI.
r. 9.
Barker v.
Allanson,
[1937]
1 K.B. 463

Under this rule any person may sue in a representative capacity who has a common interest and a common grievance with those whom he claims to represent; thus, for instance, several persons claiming preferential rights to stalls in Covent Garden market as growers of fruit within the meaning of a certain Act were held entitled to sue on behalf of the whole class of such growers. This rule applies the former practice of the Court of Chancery to actions brought in any division of the High Court, and is not confined to persons having some common ‘beneficial proprietary right’.

Duke of
Bedford v.
Ellis, [1901]
A.C. 1

Although *A* cannot by contract with *X* directly confer rights or impose liabilities upon *M*, yet *A* may represent *M*, in virtue of a contract of employment subsisting between them, and thus become *M*’s mouthpiece or medium of communication with *X*. This employment for the purpose of representation is the contract of agency. The difficulty of assigning to Agency a fit place in a treatise on the law of contract is described in a later chapter. It may be regarded as an extension of the limits of contractual obligation by means of representation, but, since its treatment here would constitute a parenthesis of somewhat uncouth dimensions, it will be convenient to postpone the subject to the conclusion of this book.

Agency
post-
poned

CHAPTER X

The Assignment of Contract

Assign-
ment of
contract

WE have already stated that the parties to a contract may under certain circumstances drop out and others take their places, and we have to ask how this can be brought about, first, by the voluntary act of the parties themselves, or one of them, secondly, by the operation of rules of law.

§ 1. *Assignment by act of the parties*

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.

(1) *Assignment of liabilities*

Liabilities
cannot be
assigned

A promisor cannot assign his liabilities under a contract.

Or conversely, a promisee cannot be compelled, by the promisor or by a third party, to accept any but the promisor as the person liable to him on the promise.

The rule is based on sense and convenience, for a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract. It is illustrated by the case of *Robson & Sharpe v. Drummond*. Sharpe let a carriage to Drummond at a yearly rent for five years, undertaking to paint it every year and keep it in repair. Robson was in fact the partner of Sharpe, but Drummond contracted with Sharpe alone. After three years Sharpe retired from business, and Drummond was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. He refused to deal with Robson, and returned the carriage. It was held that he was entitled to do so.

2 B. & A.
303

Reason
for rule

'The defendant', said Lord Tenterden, 'may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. . . . The latter therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person.'

There are certain limitations to this rule. A liability may be assigned with the consent of the party entitled; but this is in effect the rescission of one contract and the substitution of a new one in which the same acts are to be performed by different parties. This is called a 'novation' and it can only take place by agreement between the parties; novation cannot be compulsory.

Apparent
excep-
tions to
the rule

Kemp v.
Baerselman,
[1906] 2 K.B.
at p. 610

There is again nothing to prevent the parties to a contract from making the liabilities under it assignable if they wish to do so, and in *Tolhurst v. Associated Portland Cement Manufacturers* the House of Lords held that that had been the intention; they construed the contract as one between the parties named in it and their respective assigns. Tolhurst's case, therefore, was one in which the terms of the contract itself provided for its assignment, and it should be distinguished from cases of a rather different class, which do not turn on assignment in the proper sense of that word, but on the presence of circumstances which make it permissible for a contracting party to perform his side of the contract vicariously, by getting somebody else to do in satisfactory fashion the work for which the contract provides.

[1903] A.C.
414

If *A* undertakes to do work for *X* which needs no special skill, and it does not appear that *A* has been selected with reference to any personal qualification, *X* cannot complain if *A* gets the work done by an equally competent person. But *A* does not cease to be liable if the work is ill done, nor can anyone but *A* sue for payment.

British
Waggon
Co. v. Lea,
5 Q.B.D. 149

'To suits on these contracts, therefore, the original contractee must be a party. . . . This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the contractor may rely upon the act of another as performance by himself, whereas in the second case he cannot.'

Tolhurst's
Case, [1902]
2 K.B. 660,
669

In such cases, what is sometimes loosely called an assignment of a contractual liability by the original con-

Davies v.
Collins,
[1945] 1 All
E.R. 247

British
Waggon
Co. v. Lea,
5 Q.B.D. 149

tracting party is really the procuring by him of a *vicarious performance* of it through someone else; but the word 'assignment' has been used by judges to express the legal effect of the transaction between the parties. The original contracting party still remains liable on his contract and must as a rule be made a party to any action on the contract.

[1897] 1 Ch.
23

[1906]
2 K.B. 604
2 B. & A.
303

5 Q.B.D.
at p. 149

Robson v. Drummond, therefore, was a case in which the Court thought that personal, as opposed to vicarious, performance was of the essence of the contract which the parties had made. So, too, were the cases of *Griffith v. Tower Publishing Co.*, and *Kemp v. Baerselman*. But it has been said that in *Robson v. Drummond* the Court in applying the principle 'went to the utmost length to which it can be carried'. In *British Waggon Co. v. Lea* the Parkgate Waggon Co. (who were co-plaintiffs in the action) had agreed to let a number of railway waggons to the defendants and to keep them in repair. The Parkgate Co. went into liquidation and assigned both the benefit of, and the liabilities under, the agreement to the British Co. The defendants claimed to treat the contract as at an end and refused to accept the services of the British Co. The Court distinguished the case from *Robson v. Drummond* on the ground that here the defendants could not have attached special importance to the repairs being done by the Parkgate Co.; 'so long as the Parkgate Co. continues to exist, and, through the British Co., continues to fulfil its obligation to keep the waggons in repair the defendants cannot, in our opinion, be heard to say that the former company is not entitled to performance by them'. But

Nokes v.
Doncaster
Amalgamated
Collieries,
[1940] A.C.
per Viscount
Simon, L.C.,
at p. 1019

'Such a result does not depend on assignment of contract at all. . . . The contract bound the Parkgate company to produce a result, not necessarily by its own efforts, but, if it preferred, by vicarious performance through a sub-contractor or otherwise.'

Where an interest in land is transferred, liabilities attaching to the enjoyment of the interest may pass with it. But this arises from the peculiar nature of obligations attached to land, and need not be referred to here.

(2) *Assignment of rights*(a) *At Common Law*

At Common Law, apart from the customs of the Law Merchant, the benefit of a contract, or of rights of action arising from contract, cannot be assigned so as to enable the assignee to bring an action upon it in his own name, though the assignee might bring an action in the name of the assignor if authorized by him. The rule is sometimes expressed by the phrase 'a chose in action is not assignable'.

Assignability of the benefit of a contract:

'Chose in action' is 'an expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession'. The contrasted term is 'chose in possession'. The definition thus includes not only contractual rights but many rights which are not contractual, e.g. patent rights, copy-right. We are concerned here, however, only with the assignment of contractual rights.

Torkington v. Magee, [1902] 2 K.B. 427, per Channell, J.

Practically the only way in which rights under a contract can be transferred at Common Law is not by assignment at all, but by means of a substituted agreement, or 'novation'.

at Common Law only by substituted agreement;

If *A* owes *M* £100, and *M* owes *X* £100, it may be agreed between all three that *A* shall pay *X* instead of *M*, who thus terminates his legal relations with either party. In such a case the consideration for *A*'s promise is the discharge by *M*; for *M*'s discharge of *A*, the extinguishment of his debt to *X*; for *X*'s promise the substitution of *A*'s liability for that of *M*.

A written authority from the creditor to the debtor to pay the amount of the debt over to a third party, even though the debtor acknowledged in writing the authority given, did not entitle the third party to sue for the amount.

Liversidge v. Broadbent, 4 H. & N. 603

'There are two legal principles', said Martin, B., 'which, so far as I know, have never been departed from: one is that, at Common Law, a debt cannot be assigned so as to give the assignee a right to

at p. 610

sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that *M* could not assign to the plaintiff the debt due from the defendant to him. . . . The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action.'

It is thus apparent that a contract, or right of action arising from contract, cannot be assigned at Common Law except (1) by an agreement between the original parties to it and the intended assignee, which is subject to all the rules for the formation of a valid contract; or (2) by the rules of the Law Merchant under circumstances to be noted presently.

or by
custom of
mer-
chants

(b) *In Equity*

Assign-
ability of
contract
in equity

Hammond v.
Messenger, 9
Sim. 327

Equity would permit the assignment of a chose in action, including debts and other contractual rights, whether such chose were legal or equitable. If the chose were equitable—enforceable, that is, only in a Court of Equity—such as a share in a trust fund, Equity would allow the assignee to bring his suit in a Court of Equity in his own name, and the assignor, unless he had an interest in the suit, need not be a party to it. This course was free from objection, because in such a case there was no claim that could be asserted by an action at law, and there was therefore no risk that the trustees of the fund might be exposed to two actions, one by the assignor and one by the assignee. But when the chose was legal, e.g. a right under a contract, Equity had to proceed more carefully. If Equity itself enforced the claim of the assignee, that would not prevent the assignor from afterwards bringing his action at law; and the debtor would have been put to the inconvenience of resorting to Equity to restrain the assignor from bringing an action on the ground that the assignee had already recovered in Equity. Consequently Equity did not in the ordinary case enforce the assignee's claim. What it did was to infer from the assignment a duty on the assignor, on receiving a proper indemnity against costs, to lend his name to the

assignee in order that the latter might bring an action at law, and if necessary it would enforce this duty. Hence down to the passing of the Judicature Act, whenever a contractual right was assignable in Equity—and it could not be assignable otherwise—the action in a court of law was necessarily brought in the assignor's name.¹ This was primarily in the interests of the party liable, so that the result of one action should bind both assignor and assignee; and also partly in the interests of the assignor, so that he might dispute the assignment if he thought fit.

No particular form is necessary for an equitable assignment, which need not even be in writing. 'All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril.'

But the rights thus assignable do not cover all rights *ex contractu* which might be included within the term *choses in action*.

In the first place, it is said that by reason of the rules against champerty and maintenance a mere right to sue for damages cannot be assigned. It appears to be generally accepted that a right of action for tort is not assignable; but a distinction has been drawn between the assignment of a bare right of action for breach of contract and the assignment of a right of action arising out of or incidental to rights of property which are assigned at the same time. Thus the purchaser of an estate was permitted to sue for arrears of rent due from a tenant at the date of purchase, and the purchaser of a ship to sue the builder for damages for a breach of contract already committed, while the assignment of a bare 'right to litigate' has been held invalid. But it has been urged that it would be strange if an admitted debt can be assigned, while a debt which the

Brandts v.
Dunlop,
[1905] A.C.
per Lord
Macnaghten
at p. 462.
Durham
Bros. v.
Robertson,
[1898]
1 Q.B. 765
per Chitty
L. J.

Some
choses in
action not
assign-
able

May v Lane,
64 L.J.Q.B.
236

Defries v.
Milne, [1913]
1 Ch 98

Dawson v
G.N. & City
Rly., [1905]
1 K.B. 260

Ellis v
Torrington,
[1920]
1 K.B. 399

Williams v.
Protheroe,
5 Bing. 309

¹ See, however, the statement of the practice by Buller, J., in *Master v. Miller*, 4 T.R. at p. 341, which shows that a Court of Law did not always insist on the rule, but would allow the assignee to sue in his own name when the justice of the case seemed to demand it.

[1918]
2 K.B.
251, 258

debtor has repudiated by refusing to pay became unassignable on the ground that it has thereby become a bare right of action; and it was suggested, in *County Hotel v. L. & N.W. Railway*, that the rule is connected with the unassignability of choses in action at Common Law, and that the ground for it has really gone with the recognition of assignability, first in Equity, and later under the Judicature Act. The true scope of the rule is not perhaps finally settled, but only the House of Lords is in a position to say that it no longer exists.

Kemp v.
Baerselman,
[1906]
2 K.B. 604

Secondly, where some relation of personal confidence between the parties or their personal qualifications are of the essence of a contract, one party cannot assign his right to the performance of the obligations of the other, since to do so would be to increase or to alter the burden undertaken by the other without his consent. If, for example, *B* has contracted to supply *K* with 'all the eggs he shall require for manufacturing purposes for one year', *K* undertaking not to buy eggs elsewhere so long as *B* is ready to supply them, *K* cannot assign his right to be supplied with eggs to *X*; for what *B* undertook was to supply all the eggs that *K*, and not all that anyone other than *K*, might require. *K* in purporting to assign his right under such a contract is really trying to impose on *B* an obligation different from that which *B* undertook in the contract. For a similar reason a motor insurance policy cannot be assigned to the purchaser if the car is sold, for that would be to 'thrust a new assured upon a company against its will'.

Peters v.
General
Accident
Corp., [1937]
4 All E.R.
628

Tolhurst's
Case, [1903]
A.C. 414

On the other hand, where it appears from the nature of the contract that no special personal qualifications are involved, so that it can make no difference to the party on whom an obligation rests whether he performs it for the original contracting party or another, there the right to the performance of the obligation may be assigned.

But certain matters affecting the rights of the assignee must be noticed.

(a) The question whether, as between assignor and assignee, consideration is necessary in an equitable assignment is a difficult one. Inasmuch as Equity will not assist a mere volunteer, it seems that a mere *agreement* to assign a chose in action must, like other contracts, have consideration to support it. But it is possible to make a gift of, i.e. to transfer without consideration, a chose in action, provided that the transfer is completed in whatever manner is required for a transfer of that particular chose. It is also possible to transfer the beneficial interest by a declaration of trust, though here again Equity will not assist a volunteer by treating as a declaration of trust an attempted transfer which has not been completed. Further, when a completed transfer has been made, it will often in practice amount to an assignment good under the Law of Property Act, 1925, for which, as will be seen, consideration is not required.

Richards v. Delbridge,
18 Eq. 11

There remains, however, the possible case of a completed assignment which is merely equitable, and here the answer is not altogether clear. It seems possible that it might be held good in spite of the absence of consideration, for the assignee's title being complete, he need not seek the aid of the Court (which, being a volunteer, he could not obtain) to complete it. Atkinson, J., in *Holt v. Heatherfield Trust* seems to have regarded consideration as not necessary in such a case. On the other hand, there are dicta by two very learned Equity judges, who have stated in general terms that consideration is necessary to any purely equitable assignment, apparently not contemplating any distinction between an agreement to assign and a complete assignment.

[1942]
2 K.B. 1

Glegg v. Bromley,
[1912]
3 K.B. *per*
Parker, J.,
at p. 491.
Re Westerton, [1919]
2 Ch. *per*
Sargant, J.
at p. 111

(b) The assignment will not bind the debtor until he has received *notice*, not necessarily in writing, although it is effectual as between assignor and assignee from the moment it is made.

Brandts v. Dunlop,
[1905] A.C.
454, 462

(c) The assignee takes 'subject to equities'; that is, subject to all such defences as might have prevailed against

the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

Notice

It is only fair to the person liable that he should know to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor.

4 D.M. & G.
15

The reason of the rule is thus expounded by Turner, L. J., in *Stocks v. Dobson*:

at p. 16

'The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee.*'

Marchant v.
Morton,
Down, &
Co., [1901]
K B. 829

And the same case is authority for this further proposition that 'equitable titles have priority according to the priority of notice'. The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to them respectively, but according to the dates at which notice was given to the party to be charged.

Title

Assignee
takes sub-
ject to
equities

'The general rule, both at Law and in Equity, is that no person can acquire title to a chose in action or any other property, from one who has himself no title to it.'

Crouch v.
Credit Fon-
cier, L.R.
8 Q.B. 380
Mangles v.
Dixon, 3 H.
L.C. 735

And further, 'if a man takes an assignment of a chose in action, he must take his chance as to the exact position in which the party giving it stands'.

The facts of the case last cited are somewhat complex, and the rule is so clear that a complicated illustration

would not tend to make it clearer. It is enough that the assignee of contractual rights must take care to ascertain the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which his assignor may have lessened or invalidated the rights assigned.

For instance, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract for value to X, who is wholly innocent in the matter, the defrauded party may get the contract set aside in Equity in spite of its assignment to an innocent party.¹

Graham v.
Johnson,
8 Eq 36

But the debtor cannot set up against an innocent assignee a claim of a strictly personal nature that he may have against the assignor—for example, a claim for damages for fraud for having been induced to enter into the contract. He is restricted to claims which arise out of the contract itself and do not exist independently of it.

‘Where there is a claim arising out of the contract itself under which the debt arises, and the claim affects the value or amount of that which one of the parties to that contract has purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim by way of defence as cancelling or diminishing the amount of that to which the assignee asserts his right under the assignment.’

Stoddart v.
Union Trust,
[1912]
1 K B
181, 193

(3) *By Statute*

It remains to consider the statutory exceptions to the rule of the Common Law that a chose in action is not assignable.

Assign-
ment of
contract
under
Law of
Property
Act, 1925

(a) S. 25 (6) of the Judicature Act, 1873, now repealed and substantially re-enacted by s. 136 of the Law of Property Act, 1925, gives to the assignee of any debt or other legal chose in action the legal right thereto and all legal and other remedies and thus enables him to sue *in his own name*. But (1) the assignee takes subject to equities; (2) the assignment must be absolute and not by way of

¹ But contrast the case where a fraudulent party transfers goods to an innocent third party, who gives value; *supra*, p. 192.

charge, and (3) must be in writing signed by the assignor; (4) express notice in writing must be given to the party to be charged, and the title of the assignee dates from notice.

Per Channell, J., *Torkington v. Magee*, [1902] 2 K.B. at pp. 430 & 435
Bennett v. White, [1910] 2 K.B. 643

The sub-section does not touch the rules of assignment in Equity or the rights thereby created. 'The sub-section is merely machinery; it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's own name, but only where he could so sue.' The debt assigned accordingly becomes the debt of the assignee for all purposes; and if the debtor brings an action against the assignee on another claim, the assignee can set off the assigned debt against such a claim.

'Debt or other legal chose in action'

Torkington v. Magee, [1902] 2 K.B. 427, 430

In re Pain, [1919] 1 Ch. 38, 44

The meaning of the expression 'debt or other legal chose in action'¹ has been considered in several cases. It is not, as might appear at first sight, confined to choses in action which were enforceable only in a Court of Common Law, but includes any 'debt or right which the Common Law looks on as not assignable by reason of its being a chose in action but which a Court of Equity deals with as being assignable'; all rights, that is to say, the assignment of which a Court of Law or Equity would before the Judicature Act have considered lawful.

But the requirements of the Statute are more stringent than those of Equity.

Unconditional

Durham v. Robertson, [1898] 1 Q.B. 773

The Act requires the assignment to be 'absolute' and not 'by way of charge'. This means that it must not be subject to any condition, and that it must be an assignment of a sum due or about to become due, not of an amount which is dependent 'on any question as to the state of accounts' between assignor and assignee.

Thus an assignment in these words: 'in consideration of money advanced from time to time we hereby charge the sum of £1,080 (which was a sum about to become due to

¹ The Law of Property Act somewhat pedantically substitutes for the traditional term 'chose in action' the inelegant neologism 'thing in action'.

the assignor on a certain building contract) as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you' is not within the section. Nor is an assignment of so much of the assignor's salary as may be necessary to repay a sum advanced. Even the assignment of a definite part of an existing debt is not an 'absolute' assignment, but merely a 'charge' upon the whole debt; for otherwise it would be in the power of the original creditor 'to split up the single legal cause of action into as many separate legal causes of action as he might think fit', thus obviously prejudicing the position of the debtor. But any of these assignments, though not 'absolute' and therefore outside the section, may be perfectly good as equitable assignments.

But an assignment by way of mortgage, when it passes the entire interest of the assignor in the debt, may be 'absolute', despite the fact that it contains a proviso for redemption and reassignment on repayment. Such a transaction cannot prejudice the debtor; he will receive notice first of the assignment, and then of the reassignment, if one is made, so that he will always know to whom he owes the debt. There may, too, be an absolute assignment of a debt arising out of an existing contract, even though it does not become payable until a date later than the assignment.

The requirements of the Act as to form are also more stringent than in the case of an equitable assignment, since writing is required for both assignment and notice; and these requirements are peremptory, so that in a case where the debtor was unable to read and it was therefore thought useless to give him written notice, though the assignment was read over to him and understood by him, there was held to be no *legal* assignment. The written notice, however, need not be in any particular form, provided that it sufficiently indicates the fact of the assignment.

Jones v.
Humphreys;
[1902]
1 K.B. 10

Williams v.
Atlantic As-
surance Co.,
[1933]
1 K.B. 81
Durham v.
Robertson,
per Chitty
L. J., at
p. 774

Ibid.,
at p. 771.
Tancred v.
Delagoa Bay
Ry. Co., 23
Q.B.D. 239

G. & T. Earle
Ltd. v.
Hemsworth
R D C.,
44 T.L.R.
605, 758

Hockley v.
Goldstein,
90 L.J.
K B 111

Denney v.
Conklin,
[1913]
3 K B. 177

But it must not be forgotten that the method of assignment which the Act provided is in addition to, and not in substitution for, methods already in existence. The object of the section was to alter procedure, and not to make any difference in the nature or extent of the things assignable. Accordingly, when the section is complied with the action can be brought by the assignee in his own name and without making the assignor a party to it. Further, an assignment which does not comply with one or more of the requirements of the Act may still be a perfectly good and valid equitable assignment and enforceable accordingly. Omission to take advantage of the machinery provided by the Act means only that the assignor must still be made a party to the action; but this can now be done by making him a co-plaintiff, if he is willing, or a defendant, if he is not willing, and no separate proceedings to enforce the use of his name are necessary. The joinder of the assignor as a party may even be dispensed with if his joinder would be a mere formality or not necessary for the proper protection of the debtor. The Act, in other words, only affords a simplified method of assignment for those who choose to avail themselves of it.

Brandts v.
Dunlop,
[1905] A C.
pp. 461, 462

Performing
Right
Society v.
Theatre of
Varieties,
[1924]
A C. 1, 31

Brandts v.
Dunlop,
at p. 462

Considera-
tion

In re
Westerton,
[1919]
2 Ch. 104

An assignment under the Law of Property Act does not require consideration to make it valid as between assignor and assignee or to enable the assignee to sue in his own name.

3 Q.B.D.
569.
Swan v
Maritime
Insce Co.,
[1907] 1
K B. 116

An assignment duly made, whether by the rules of Equity or by those of the Law of Property Act, operates without the consent of the party liable. In *Brice v. Bannister* (a case of equitable assignment) the defendant received express notice of the assignment of a debt accruing from him to the assignor. He refused to be bound by the assignment and paid his debt to the assignor. He was held liable, notwithstanding, to the assignees for the amount assigned.

Policies of
life insur-
ance

ss. 1, 3

(b) By the Policies of Assurance Act, 1867, policies of life insurance are assignable in a form specified by the Act, so that the assignee may sue in his own name. Notice must

be given by the assignee to the insurance company, and he takes subject to such defences as would have been valid against his assignor.

(c) By the Marine Insurance Act, 1906, policies of marine insurance are similarly assignable; but this Statute contains no requirement as to notice.

Policies of
marine in-
surance
s 50

(d) Shares in Companies are assignable under the provisions of the Companies Clauses Act, 1845, and the Companies Act, 1929.

Shares

(e) Mortgage debentures issued by Companies under the Mortgage Debenture Act, 1865, are assignable in a form specified by the Act.

Mortgage
deben-
tures

(4) *Negotiability*

So far we have dealt with the assignment of contracts by the rules of Common Law, Equity, and Statute, and it appears that under the most favourable circumstances the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses himself.

Assigna-
bility to
be distin-
guished

We now come to deal with a class of promises in writing the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defences which would have been good against the assignor of the promise. In other words, we come to consider that special class of assignable contracts known as *negotiable instruments*.

from
negotia-
bility

The essential features of a negotiable instrument appear to be these:

Features
of nego-
tiability

Firstly, the title to it passes by delivery, or, if it is made payable 'to order' (that is to say, either expressed to be so payable, or expressed to be payable to a particular person), then by the indorsement of the holder completed by delivery.

Secondly, the written promise which it contains gives a

right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Thirdly, the holder for the time being (if he is a bona fide holder for value) is not prejudiced by defects in the title of his assignor; he does not hold 'subject to equities'.

Notice therefore need not be given to the party liable, and the assignor's *title* is immaterial.

Negotiability by custom,
Rumball v. Metropolitan Bank,
2 Q.B.D.
194

Infra, p. 280

Certain instruments are negotiable by the custom of merchants recognized by the Courts; such are foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company, and, perhaps we may say, other instruments to which the character of negotiability may from time to time be attached by the custom of merchants proved to the satisfaction of the Courts.

by statute

Bills of Exchange were negotiable by the law merchant;¹ promissory notes by 3 & 4 Anne, c. 9; both classes of instruments are now governed by the Bills of Exchange Act, 1882. A cheque is a bill of exchange drawn on a banker, but it possesses certain features of its own which are not common to all bills of exchange. A Bank of England note is a promissory note which by statute is made legal tender.

Bank of England Act, 1833.
Infra, p. 317
Bills of Lading Act, 1855

Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which will call for a separate consideration. As we shall see, they are not negotiable instruments.

Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative

¹ We commonly speak of a bill of exchange or a promissory note being a 'negotiable instrument'. But it is to be noted that a particular bill or note is only negotiable if it is in a condition of negotiability. It may, for instance, in its origin contain words prohibiting transfer, or indicating an intention that it should not be transferable, in which case it is valid as between the parties thereto, but is not negotiable. (Bills of Exchange Act, 1882, s. 8 (1).) Or a bill negotiable in its origin may cease to be negotiable if it is indorsed 'restrictively', e.g. 'Pay D only'. (s. 35 (1).)

of the nature of negotiability, that we will shortly consider their principal features.

A bill of exchange is an unconditional written order, addressed by *M* to *X*, directing *X* to pay a sum of money to a specified person or to bearer. Usually this specified person is a third person *A*, but *M* may draw a bill upon *X* in favour of himself. We must assume that the order is addressed to *X* either because he has in his control funds belonging to *M* or is prepared to give *M* credit; and since we are here dealing with bills of exchange merely as illustrative of negotiability, we will adopt the most usual, as it is the most convenient, form of illustration.

A bill of exchange

Bills of Exchange Act, 1882, s. 3 (1)

See form in Appendix D

M directs *X* to pay a sum of money to '*A* or order', or '*to A* or bearer'. *M* is then called the drawer of the bill, and by drawing it he promises to pay the sum specified either to *A* or to any subsequent holder into whose hands it may come, if *X* does not 'accept' the bill, or, having accepted it, fails to pay.

How drawn

X, upon whom the bill has been drawn, is called the drawee; but when he has assented to pay the sum specified, he is said to become the 'acceptor'. Such assent (or 'acceptance') must be expressed by writing on the bill signed by the acceptor, or by his simple signature. The drawer of the bill may transfer it to another person before it has been 'accepted'; and in that case it is the business of the transferee to present it to the drawee for acceptance. He is entitled to demand an unconditional acceptance; but he may (if he pleases) take one qualified by conditions as to amount, time, or place,¹ though this releases the drawer or any previous indorser from liability unless they assent to the qualification.

How accepted

ss 19, 44

If the bill be payable '*to A* or bearer', it can be transferred from one holder to another by mere delivery: if it is

¹ Note, however, that by s. 19 (2) (c) of the Bills of Exchange Act a condition as to place is not to be regarded as qualifying an acceptance, 'unless it expressly states that the bill is to be paid there only *and not elsewhere*'. Hence the common form 'accepted payable at the X. Bank' is not a qualified acceptance.

payable 'to *A* or order', it must be first indorsed. Until it is indorsed, it is not a complete negotiable instrument.

Indorse-
ment in
blank

If the indorsement consists in the mere signature of *A*, the bill is said to be indorsed 'in blank'. It then becomes a bill payable to bearer, that is, assignable by mere delivery; for *A* has given his order, though it is an order not mentioning any particular person. The bill is in fact indorsed over to any one who becomes possessed of it.

Special
indorse-
ment

If the indorsement takes the form of an order in favour of *D*, written on the bill and signed by *A*, it is called a 'special' indorsement. Its effect is to assign to *D* the right to demand acceptance from the drawee, if the bill has not already been accepted; or payment, if the drawee has already accepted and the bill has fallen due. In the event of default in acceptance or payment, *D* may demand payment either from the original drawer, or from *A* the indorser; for an indorser is to all intents a new drawer, and becomes therefore an additional security for payment to the holder for the time being. If the bill has been accepted, *D* may also demand payment from the acceptor.

A promissory
note

See form in
Appendix D

A promissory note is a promise in writing made by *X* to *A* that he will pay a certain sum, at a specified time, or on demand, to *A* or order, or to *A* or bearer. *X*, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are like those relating to a bill of exchange.¹

Assigna-
bility
disting-
uished
from
negotia-
bility

We may now endeavour to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Let us suppose that *A* draws a bill on *X* payable to himself or order and, having procured *X*'s acceptance, indorses the bill over to *D*. When the time for payment falls due, *D* presents the bill for payment to *X*, the acceptor, and sues him upon default.

¹ An I.O.U., which at first sight would seem to bear some resemblance to a promissory note, is not a legal instrument of any kind; it is only evidence of an 'account stated'; see as to this, *infra*, p. 430.

In the case of negotiable instruments consideration is presumed to have been given until the contrary is shown, and notice of assignment (as would be required in the case of an ordinary chose in action) is not necessary. *D* will therefore have to do no more than prove that the signature of acceptance on the bill is *X*'s signature, everything else being presumed in his favour.

Consideration presumed.
Notice not needed

Suppose, however, it turn out that the bill was accepted by *X* on account of a gambling debt owed by him to *A*, or was obtained from him by fraud. The position of *D* is then modified to this extent.

As between *A* and *X* the bill would be void or voidable according to the nature of the transaction, but this does not necessarily affect the rights of *D*, the subsequent holder, or of persons deriving their title through *D*.

Every holder of a completed bill of exchange is *prima facie* deemed to be a holder in due course—that is, he is deemed to have given value for it in good faith, without notice of any defect in the title of the person who negotiated it. But if in an action on the bill evidence is given that the acceptance, issue, or subsequent negotiation of the bill is tainted with fraud or illegality of some kind, then this presumption no longer holds good; the burden of proof is shifted, and the holder of the bill must prove affirmatively that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill, though not necessarily by himself. If he can do so, he will win his action, whatever the earlier history of the bill may be, unless he was himself a party to the fraud or illegality alleged. A holder who has been a *party* to the fraud or illegality can never succeed, though mere knowledge of it will not invalidate his title, if he derives his title, not from a person whose own title is defective, but from one who is himself a holder in due course.

Position of subsequent holder

Tatam v Haslam, 23 Q B D. 345

Illegal consideration for making bill:

And the effect of an illegal consideration for an indorsement should also be noticed. The indorsee cannot sue the indorser on the illegal contract made between them; but he

Flower v. Sadler, 10 Q B.D. 572

for
indorse-
ment

London
Joint Stock
Bank v.
Simmons,
[1892] A.C.
217

can sue the acceptor, and probably one who indorsed the bill before the illegality.

A broker pledged his client's bonds, which were negotiable by the custom of merchants, with a bank, to secure advances made to himself. The bank had no notice that the bonds were not his own, or that he had no authority to pledge them: he became insolvent; the bank sold the bonds in satisfaction of the debt due, and the broker's client sued the bank. The House of Lords held that he could not recover; for (1) the bonds were negotiable, and (2) being so negotiable—

'It is of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary: and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority.'

L.R. 8 Q.B.
374

The class
of nego-
tiable in-
struments
may be
added to
by mer-
cantile
usage

L.R. 10 Ex.
at p. 346

[1898]
2 Q.B. 658

at p. 675

The case of *Crouch v. Credit Foncier of England* was formerly cited as authority for the proposition that, so far as documents made in England by English merchants are concerned, the list of negotiable instruments is closed, and that no evidence of usage will avail unless the incident of negotiability has been annexed by the law merchant to the instrument in question. The Court of Exchequer Chamber in *Goodwin v. Roberts* questioned its authority on this point, and in *Bechuanaland Exploration Co. v. London Trading Bank*, Kennedy, J., held that it was overruled by *Goodwin v. Roberts*. He allowed recent mercantile usage, sufficiently proved, to make negotiable certain debentures, issued in England by an English company, made payable to bearer but not corresponding in character to any instrument negotiable by the law merchant or by statute.

[1902]
2 K.B. 144

The decision in this case was followed by Bigham, J., in *Edelstein v. Schuler*. The law merchant, it was there laid down, must not be regarded as stereotyped and immutable; on the contrary, owing to the vast increase in the number of commercial transactions the law merchant may

be modified far more quickly than was the case a century ago; and the Courts will now take judicial notice of the fact that debenture bonds payable to bearer are negotiable.

Before leaving this subject it is important to notice that the doctrine of consideration does not apply to negotiable instruments in the same way as to ordinary contracts. There is usually no consideration between remote parties to a bill, such as the acceptor and the payee: there need be none between the drawer and an indorsee when, either from acceptance being refused or the bill being dishonoured by the acceptor, recourse is had to the drawer.

Consideration and negotiable instruments

Moreover, it is possible that *A*, who has given no value for a bill, may recover from *X*, who has received no value, provided that some intermediate holder between *A* and *X* has given value for it. This is apparent if we look at the case of an 'accommodation bill'.

A is in need of £100, and his own credit is not good enough to enable him to borrow; but *M* is prepared to advance the money to him, if *X*, a friend of *A*, is willing to undertake the obligation to repay it (say) in three months' time. This arrangement is carried out by means of an 'accommodation bill'. *A* draws a bill for £100 upon *X* payable to himself or order three months after date. *X* accepts the bill, and thereby undertakes to pay the bill at maturity to the person who shall then be the holder of it. *A* negotiates the bill by indorsement to *M*, who gives him £100 for it, less a 'discount' for cash. *M*, who has given value, can sue *X*, the acceptor, who has received none;¹ but we may take the matter a stage further. *M*, who has given value, indorses the bill to *S*, who receives it as a present, giving no value for it. It would seem that, *once value is given*, any subsequent holder can sue the acceptor or any other person who became a party to the bill prior

Scott v. Lifford, 1 Camp. 246

¹ *A* will probably have induced *X* to become the acceptor of the bill by promising to provide him with funds to meet the bill when it falls due. But if he fails to do so, and *X* is called on to meet the bill out of his own pocket, he has in effect paid money to *M* at the request of *A*; and the law thereupon implies a promise by *A* to indemnify him therefor.

to the giving of value. And so *S*, who has given nothing, may sue *X*, who has received nothing.

5 Exch. 948

An illustration is furnished by the case of *Milnes v. Dawson*, where the drawer of a bill of exchange indorsed it, without value, to the plaintiff; after having thus assigned his rights in the bill, though without consideration, he received scrip in satisfaction of the bill from the acceptor, the defendant.

'It would be altogether inconsistent with the negotiability of these instruments', said Parke, B., 'to hold that after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property is passed, the right to sue upon the bill follows also. A bill of exchange is a chattel, and the gift is complete by delivery coupled with intention to give.'

Original
object of
bills of
exchange

The rules of negotiability took their rise out of the custom of merchants, which assumed that the making of a bill or note was a business transaction. Value must be given at some time in the history of the instrument; but to insist that consideration should have passed between the holder and the party sued would have defeated the object for which such instruments came into existence.

For the object of a bill of exchange was to enable a merchant resident in one part of England to pay a creditor resident in another part of England, or abroad, without sending his debt in specie from one place to another. *A*, in London, owes £100 to *X* in Paris: *A* does not want to send gold or notes to France, and has no agent in Paris, or correspondent with whom he is in account, and through whom he can effect payment. But *M*, another merchant living in London, has a correspondent in Paris named *S*, who, according to the terms of business between them, will undertake to pay money on his account at his direction. *A* therefore asks *M*, in consideration of £100, more or less according to the rate of exchange between London and Paris, to give him an order upon the correspondent *S*. Thereupon *M* draws a bill upon *S* for the required sum, in favour of *A*. *A* indorses the bill, and sends it to his credi-

tor *X*. *X* presents it for acceptance to *S*; if all goes well the bill is accepted by *S*, and in due time paid.

Sir M. Chalmers thus compares the original object, and the modern English use, of bills of exchange:

‘A bill of exchange in its origin, was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit.’

Bills of Exchange, 10th ed. Introduction, p. xliix

Though lacking the traits of negotiability the instrument known as a ‘bill of lading’ should be noticed here.

Bill of lading

A bill of lading may be regarded in three several aspects.

See form, Appendix B

(1) It is a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board; (2) it is the document which contains the terms of the contract for the carriage of the goods agreed upon between the shipper of the goods and the shipowner (whose agent the master of the ship is); and (3) it is a ‘document of title’ to the goods, of which it is the symbol. It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas.

Three copies of the bill of lading are usually made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to *X*, the consignee, who (in the normal case) on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor’s right of stoppage *in transitu*.¹

But if, before stoppage, the consignee assigns a bill of lading by indorsement to a holder for value, that holder

What rights its assign-ment con-fers

¹ Stoppage *in transitu* is the right of the unpaid vendor, upon learning the insolvency of the buyer, to retake the goods before they reach the buyer’s possession, and to retain them until payment or tender of the price. For the history of this right the reader is referred to the judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*, 8 M. & W. 330.

Sale of Goods Act, 1893, ss. 44-46

Lickbarrow
v. Mason,
2 T.R. 64

has a title to the goods which overrides the vendor's right of stoppage *in transitu*, and can claim them in spite of the insolvency of the consignee and the consequent loss of the price of his goods by the consignor.

By law
merchant,
proprie-
tary
rights,

His right, however, which in this respect is based upon the law merchant, is a right of property only. The assignment of the bill of lading gives a right to the goods. It did not at Common Law give any right to sue on the contract expressed in the bill of lading.

by Bills of
Lading
Act, 1855,
contractual
rights ;

The Bills of Lading Act, 1855, confers this right. The assignment of a bill of lading thereby transfers to the assignee not only the property in the goods, but 'all rights of suit' and 'all liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself'.

But a bill of lading differs from the negotiable instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these are in a sense wider than those possessed by the assignor, because the assignee can defeat the right of stoppage *in transitu* ; thus it differs from negotiable instruments, which only confer rights *in personam*.

but not
independ-
ent of as-
signor's
title

Gurney v.
Behrend,
3 E. & B.
at p. 634

But though the assignee is relieved from one of the liabilities to which the assignor is exposed, he does not acquire proprietary rights independent of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a bona fide indorsee. And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading, then, is a contract assignable without notice ; it so far resembles conveyance, that it gives a title to property, but it cannot give a better title, whether proprietary or contractual, than is possessed by the assignor ; subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

§ 2. *Assignment of contractual rights and liabilities by operation of law*

So far we have dealt with the voluntary assignment by parties to a contract of the benefits or the liabilities of the contract. But rules of law may also operate to transfer these rights or liabilities from one to another.

If *A* by purchase or lease acquire an interest in land of *M*, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest to *X* will, within certain limits, operate as a transfer to *X* of those obligations.

Assign-
ment of
interests
in land

The subject of the assignment of obligations upon the transfer of interests in land is, however, in view of recent legislation on the law of property, best studied in the special works on that branch of the law, and is accordingly omitted here.

Marriage, which once transferred to the husband conditionally the rights and liabilities of the wife, has no effect since the Act of 1935.

Marriage

Ante, p. 140

Representation, in the case of death or bankruptcy, effects an assignment to the executors or administrators of the deceased, or to the trustee of the bankrupt, of his rights and liabilities; but the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased or the bankrupt. The assignees of the contract take no benefit by it, nor are they personally losers by the enforcement of it against them. They represent the original contracting party to the extent of his estate and no more.

Repre-
sentation

(1) *Assignment of contractual obligation by death*

The general rule is that the rights and liabilities under a contract pass, on the death of a party to the contract, to his representatives.

Rights of
representa-
tives

But performance of such contracts as depend upon the personal service or skill of the deceased cannot be demanded of his representatives, nor can they insist upon offering such performance, though they can sue for money

Contracts
depend-
ent on per-
sonal
skill or
service

Stubbs v.
Holywell
Ry. Co.,
L.R. 2
Exch. 311
Baxter v.
Burfield,
2 Str. 1266

earned by the deceased and unpaid at the time of his death. Contracts of personal service expire with either of the parties to them: an apprenticeship contract is terminated by the death of the master, and no claim to the services of the apprentice survives to the executor.

Infra, p. 368

With regard to rights of action for a breach of contract the Law Reform (Miscellaneous Provisions) Act, 1934, provides that all causes of action subsisting against, or vested in, a person, shall survive against or for the benefit of his estate. The only qualifications to which this provision is subject in the law of contracts are, that, where a cause of action survives for the benefit of a deceased person's estate, the damages are not to include any 'exemplary' damages, and in the case of a breach of promise to marry, they are to be limited to such damage, if any, to the estate of the deceased as flows from the breach of promise. The Act, however, appears to have been so worded, perhaps unintentionally, as to provide that if the deceased person is the party who *broke* the contract, his estate will be liable for the same damages as he would himself have been liable for if he had been living.

(2) *Assignment of contractual obligation by bankruptcy*

Trustees'
powers:
their ex-
tent, and
limits

Bankruptcy is regulated by the Bankruptcy Act, 1914, which repealed and re-enacted with amendments and additions the existing statutes on the subject. Proceedings in bankruptcy commence with the filing of a petition in a Court of Bankruptcy either by a creditor alleging acts of bankruptcy against the debtor or by the debtor himself alleging inability to pay his debts. Unless this petition prove unfounded, the Court makes a receiving order and appoints an official receiver who takes charge of the debtor's estate and summons a meeting of the creditors.

If the creditors decide not to accept a composition, but to make the debtor bankrupt, he is adjudged bankrupt and a trustee appointed.

To the trustee passes all the property of the bankrupt

vested in him at the time of the act of bankruptcy or acquired by him before discharge, and the capacity for taking proceedings in respect of such property; but all that we are concerned with in respect of the rights and liabilities of the trustee is to note that—

(i) Where any part of the property of a bankrupt consists of choses in action, they shall be deemed to have been duly assigned to the trustee;

(ii) He may, within twelve months of his appointment, disclaim, and so discharge, unprofitable contracts;

(iii) He is probably excluded from suing for 'personal injuries arising out of breaches of contract, such as contracts to cure or to marry', even though 'a consequential damage to the personal estate follows upon the injury to the person'.

Drake v.
Beckham,
11 M. & W.
319

But the trustee, as statutory assignee of the bankrupt's choses in action, is not in the same position as an ordinary assignee for value; he only takes subject to all equities existing in such choses in action at the date of the commencement of the bankruptcy. If, therefore, a chose in action has been assigned for value before the bankruptcy took place, and no notice of assignment given to the debtor, the trustee cannot acquire priority over the assignee by being the first to give notice.

In re Wallis
[1902] 1
K.B. 719

PART III

THE INTERPRETATION OF CONTRACT

Interpre-
tation of
contract

AFTER considering the elements necessary to the formation of a contract, and the operation of a contract as regards those who are primarily interested under it, and those to whom interests in it may be assigned, it seems that the next point to be treated is the mode in which a contract is dealt with when it comes before the Courts in litigation. In considering the interpretation of contract we require to know how its terms are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules are adopted for construing the meaning of the terms when fully before the Court.

In what
the sub-
ject
consists

Rules re-
lating
(1) to evi-
dence and
(2) to con-
struction

The subject then divides itself into rules relating to evidence and rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

CHAPTER XI

Rules Relating to Evidence and to Construction

IF a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the Court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.

Provinces
of Court
and Jury

The same rule applies to contracts made in writing. When men have put into writing any part of their contract they cannot alter by parol evidence that which they have written. When they have put into writing the whole of their contract they cannot add to or vary it by parol evidence.

Contracts wholly oral may be dismissed at once. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract must be answered by reference to the formation of contract.

Why oral
contracts
need not
be dis-
cussed

All that we are concerned with here is to ascertain the circumstances under which extrinsic oral evidence is admissible in relation to written contracts and contracts under seal. Such evidence is of three kinds:

Three
matters of
inquiry

(1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

1. Proof of
existence
of docu-
ment;
2. Of fact
of agree-
ment;

(2) Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

3. Of terms of contract

(3) Evidence as to the terms of the contract. These may be incomplete, and may need to be supplemented by parol proof of the existence of other terms; or they may be ambiguous and then may be in like manner explained; or they may be affected by a usage the nature of which has to be proved.

We are thus obliged to consider—

- (1) evidence as to the existence of a document;
- (2) evidence that the document is a contract;
- (3) evidence as to its terms.

Difference between formal and simple contract
In the first the instrument is the contract,

We must note that a difference, suggested some time back, between contracts under seal and simple contracts, is illustrated by the rules of evidence respecting them. A contract under seal derives its validity from the form in which it finds expression: therefore if the instrument is proved the contract is proved, unless it can be shown to have been executed under circumstances which preclude the formation of a contract, or to have been delivered under conditions which have remained unfulfilled, so that the deed is no more than an escrow.

Wake v. Harrop, 6 H. & N. 775

But 'a written contract not under seal is not the contract itself, but only evidence, the record of the contract'.

in the second the writing is only evidence of the contract

Even where statutory requirements for writing exist, as under the Statute of Frauds, the writing is no more than evidentiary of a previous or contemporaneous agreement. A written offer containing all the terms of the contract signed by *A* and accepted by performance on the part of *B*, is enough to enable *B* to sue *A* under that section. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by acts, or by writing, or partly by one, and partly by another of these processes.

It is always possible, therefore, that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it.

‘They put on paper what is to bind them, and so make the written document conclusive evidence between them.’

Wake v.
Harrop, 6
H. & N. 775

§ 1. *Proof of document*

A contract under seal is proved by evidence of the signature, sealing and delivery. Formerly, where a document under seal was attested, it was necessary to call one of the attesting witnesses, but now by statute this is no longer required save in those exceptional cases in which attestation is necessary to the *validity* of the document, of which a contract under seal is not one.

Proof of
contract
under seal

Criminal
Procedure
Act, 1865

In proving a simple contract parol evidence is always necessary to show that the party sued is the party making the contract and therefore bound by it.¹ And parol evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance: *A B* in Oxford writes to *X* in London, ‘I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) *A B*.’ To prove the conclusion of the contract it would be necessary to prove the dispatch of the horse. And so if *A* puts the terms of an agreement into a written offer which *X* accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with *X*, parol evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of *X*.

Of simple
contract

Supple-
mentary
oral evi-
dence
where
contract
written
only in
part,

Harris v.
Rickett, 4
H. & N. 1

So, too, where a contract consists of several documents which need parol evidence to show their connexion, such evidence may be given to connect them. This rule needs some qualification as regards contracts of which the Statute of Frauds requires a written memorandum. The

or where
connexion
of parts
does not
appear
from
docu-
ments

¹ As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice being given by one party to the other to admit such a document. Such admissions are regulated by Order xxxii of the Rules of the Supreme Court. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for production may give secondary evidence of the contents of the document.

Long v.
Millar, 4 C.
P.D. 456

documents must in such a case contain a reference, in one or both, to the other, in order to admit parol evidence to explain the reference and so to connect them.

Edwards v.
Aberayron
Mutual
Insurance
Society, 1
Q.B.D. 588

In contracts which are outside the Statute evidence would seem to be admissible to connect documents without any such internal reference. 'I see no reason', said Brett, J., 'why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance.'

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but these are a part of the general law of evidence, and the rules which govern the admissibility of such evidence are to be found in treatises on the subject.

§ 2. *Evidence as to fact of Agreement*

Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the Court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement.

It may be shown by such evidence that the contract was invalid for want of consideration, of capacity of one of the parties, of genuineness of consent, of legality of object. Extrinsic evidence is used here, not to alter the purport of the agreement, but to show that there never was such an agreement as the law would enforce.

Evidence
of con-
dition sus-
pending
operation
of contract
In the
case of
a deed :

Lady Naas
v. Westminster Bank
Ltd., [1940]
A.C. at
p. 399

It may also be shown by extrinsic evidence that a parol condition suspended the operation of the contract. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act. Until the event happens or the act is done the deed remains an escrow, and the terms upon which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument.

In like manner the parties to a written contract may

agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative.

of a simple
contract
Pym v.
Campbell,
6 E. & B.
370

Campbell agreed to purchase of the Messrs. Pym a part of the proceeds of an invention which they had made. They drew up and signed a memorandum of this agreement on the express verbal understanding that it should not bind them until the approval of one Abernethie had been expressed. Abernethie did not approve of the invention, and Campbell repudiated the contract. Pym contended that the agreement was binding, and that the verbal condition was an attempt to vary by parol the terms of a written contract. The Court held (and its decision has been affirmed in a later case) that evidence of the condition was admissible on the ground thus stated by Erle, J.:

Pattle v.
Horn-
brook,
[1897] 1 Ch.
25

‘The point made is, that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional: and if that had been so it would have been wrong. But I am of opinion that *the evidence showed that in fact there was never an agreement at all*. The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that *evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.*’

at p. 374

§ 3. *Evidence as to the terms of the Contract*

When we come to extrinsic evidence as affecting the terms of a contract, the admissibility of such evidence is narrowed to a small compass; for ‘according to the general law of England the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties’. This rule has of course no application to the case of a *subsequent* agreement between the parties varying the terms of the original contract.

Evidence
as to
terms

General
rule

Blackburn,
J., in *Burges*
v. *Wick-*
ham, 3 B.
& S. 696
Infra, p. 306

Henderson
v. Arthur,
[1907]
1 K.B. 10

Arthur was lessee of a theatre and covenanted in the lease to pay the rent quarterly in advance. Before the lease was finally executed, the parties had agreed by parol that Arthur should pay each quarter by a three months' bill, which he duly tendered but which was refused by the lessor. The lessor sued for the rent, which Arthur alleged that he had paid according to the parol agreement. The Court of Appeal said that the covenant meant payment in cash; that payment by bill was not payment in cash; and that therefore the parol agreement contradicted the terms of the lease and evidence of it could not be admitted.

We find exceptions to this rule—

Excep-
tions

(a) where supplementary or collateral terms are admitted in evidence to complete a contract the rest of which is in writing;

(b) where explanation of terms in a contract is needed;

(c) where usages are introduced into a contract;

(d) where, in the case of mistake, special equitable remedies may be applicable.

Supple-
mentary
terms

(a) If the parties to a contract have not put all its terms into writing, evidence of the supplementary terms is admissible, not to vary but to complete the written contract.

Jervis v.
Berridge,
8 Ch 351

Jervis agreed to assign to Berridge a contract for the purchase of lands from *M*. The assignment was to be made upon certain terms, and a memorandum of the bargain was made in writing, from which at the request of Berridge some of the terms were omitted. In fact the memorandum was only made in order to obtain a conveyance of the lands from *M*. When this was done and Berridge had been put in possession he refused to fulfil the omitted terms which were in favour of Jervis. On action being brought he resisted proof of them, contending that the memorandum could not be added to by parol evidence. Lord Selborne, however, held that the memorandum was 'a mere piece of machinery obtained by the defendant *as subsidiary to and for the purposes of the verbal and only real agreement under*

circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent'.

Again, evidence may be given of a verbal agreement collateral to the contract proved. A term thus introduced into the written agreement must not be contrary to its tenor. A farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down; he was held entitled to compensation for damage done to his crops by a breach of the verbal promise, though no reference to it appeared in the terms of the lease.

Mellish, L. J., in giving judgment, said:

'No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself.'

Collateral terms

Jameson v. Kinnell Bay Land Co., 47 T.L.R. 593

Erskine v. Adeane, 8 Ch. at p. 766

(b) Evidence in explanation of terms may be evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent contracts in his own name but on behalf of a principal whose name or whose existence he does not disclose.

Explanation of terms; to identify parties, Wake v Harrop, 6 H & N 768

Or it may be a description of the subject-matter of the contract. A agreed to buy of X certain wool which was described as 'your wool'; the right of X to bring evidence as to the quality and quantity of the wool was disputed. The Court held that the evidence was admissible.

or subject-matter,

Macdonald v. Longbottom, 1 E. & E 977

Or such evidence may be an explanation of some word not describing the subject-matter of the contract but the nature of the responsibility which one of the parties assumes in respect of the conditions of the contract. Where a vessel is warranted 'seaworthy', a house promised to be kept in 'tenantable' repair, a thing undertaken to be done in a 'reasonable' manner, evidence is admissible

to show application of phrases

to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties.

3 B. & S.
669

In *Burges v. Wickham*, a vessel called the Ganges, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, temporarily strengthened so as to be fit to meet the perils of such a voyage. She was insured, and in every voyage policy of marine insurance there is an implied warranty by the assured that the vessel is 'seaworthy'. The Ganges was not seaworthy in the sense in which that term was usually applied to an ocean-going vessel, but the underwriters knew the nature of the vessel, and though the adventure necessarily was more dangerous than the voyage of an ordinary vessel, she was made as seaworthy as a vessel of her type could reasonably be made. The underwriters took the risk at a higher premium than usual, and in full knowledge of the facts. The Ganges was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy for the purpose of an ocean voyage, and they resisted the admission of evidence to show that, with reference to this particular vessel and voyage, 'seaworthiness' was understood in a modified sense. The evidence was held to be admissible on grounds stated very clearly by Blackburn, J.:

at p. 698

'It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, sed *secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of the other.

'In these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to

be understood, not *simpliciter*, but *secundum quid*. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure; it is to be understood, not *simpliciter*, but *secundum quid*.¹

Cases such as we have described are cases of *latent ambiguity*: and they must be carefully distinguished from *patent* ambiguities, where words are omitted, or contradict one another; for in such cases explanatory evidence is not admissible. Where a bill of exchange was expressed in words to be drawn for 'two hundred pounds' but in figures for '£245', evidence was not admitted to show that the figures expressed the intention of the parties.¹

Latent
and
patent
am-
biguity

Saunderson
v. Piper,
5 Bing. N.C.
425

Usage

(c) The usage of a trade or of a locality may be proved, and by such evidence a term may be annexed to a written contract, or a special meaning may be attached to some of its provisions.

Parol evidence of a usage which adds a term to a written contract is admissible on the principle that—

'There is a presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.'

Hutton v.
Warren, 1
M. & W. 466

By way of illustration of a commercial usage we may take the warranty of seaworthiness which is always held to be included in a voyage policy of marine insurance though not specially mentioned.

For a local usage we may take the right of a tenant quitting his farm at Candlemas or Christmas to reap corn sown in the preceding autumn, a right which the custom of the country annexed to his lease, though the lease was under seal and contained no such term.

Wiggles-
worth v.
Dallison,
1 Doug. 201

Parol evidence of usage to explain phrases in contracts, whether commercial, agricultural, or otherwise subject to known customs, is admissible on the principle that—

'Words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such

Brown v.
Byrne, 3
E. & B. 716

¹ Note that now by the Bills of Exchange Act, 1882, s. 9 (2), where the words and the figures differ in a bill of exchange, the former are declared to prevail.

cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.'

Thus in the case of a charter-party in which the days allowed for unloading the ship are to commence running 'on arrival' at the ship's port of discharge, if by custom 'arrival' is understood to mean arriving at a particular spot in the port, evidence may be given to show what is commonly understood by 'arrival' at the port.

Norden
Steam Co.
v. Dempsey,
1 C.P.D. 658

Smith v.
Wilson, 3
B. & Ad. 728

And so where the lessee of a rabbit warren covenanted that he would leave 10,000 rabbits on the warren, parol evidence was admitted that, by local custom, 1,000 meant 1,200.

Hills v.
Evans, 31
L.J.Ch 457

Closely connected with the principle that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents.

Per Erie,
C.J., in
Meyer v
Dresser, 16
C.B., N.S.
660
Con-
ditions
under
which
usage
operates

But in order that a usage thus proved may enlarge or explain a contract it must satisfy two requirements. It must be reasonable and consistent with general rules of law, and it must not be inconsistent with the terms of the contract. For no usage can prevail against a rule of Common Law or Statute;¹ and it is always open to parties to exclude the usage either by express terms or by framing their contract so as to be repugnant to its operation. Thus in *Palgrave v. S.S. Turid* a charter-party provided that a vessel should deliver a cargo 'always afloat', the cargo to be 'taken from alongside the vessel at charterers' risk and expense as customary'. The vessel could not lie 'always afloat' nearer than thirteen feet from the quay, and the custom of the port was to erect a wooden staging over which the cargo was carried at the shipowner's expense and deposited on the quay some feet from the water's edge. In an action by the shipowner for the difference between the cost of discharging in this manner and the cost of de-

[1922]
1 A.C. 397

Ante, p. 244

¹ Nevertheless the usage of a society to compel its members to carry out contracts *avoided* by Statute may constitute a risk against which the person employed to make such contracts is indemnified by his employer, where both know of the usage.

livery at the ship's rail, it was held that the custom was inconsistent with the express terms of the charter requiring the charterers to take delivery 'from alongside the vessel' at their own expense, and accordingly afforded no defence to the action.

A usage must in any case, it is clear, add something to the written contract, and in that sense does vary it. The true test whether it is inconsistent with, or repugnant to, what is written is to be found by asking the question whether what is added by the usage 'is such as *if expressed in the contract* would make it insensible or inconsistent'.

(d) In the application of equitable remedies, such as the grant or refusal of specific performance, the rectification of documents or their cancellation, extrinsic evidence is more freely admitted.

Thus, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted, evidence has been admitted to show that the offer was made by inadvertence and was not accepted in good faith. The case of *Webster v. Cecil* is here in point. A offered to X several plots of land for a round sum; immediately after he had dispatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed X of the mistake without delay, but not before X had concluded the contract by acceptance. In resisting specific performance he was permitted to prove the circumstances under which his offer had been made.

Again, where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties. And this is done for two purposes and under two sets of circumstances.

Where a contract has been reduced into writing, or a deed executed, and the writing or deed, owing to mutual mistake, fails to express the concurrent intention of the

Lord Campbell in *Humfrey v. Dale*, 7 E. & B. 275. Proved mistake a ground for refusing specific performance

30 Beav. 62
Supra, p. 162

Rectification of documents

Earl Beauchamp v. Winn, L.R. 6 H.L. at p. 232

Shipley U.D.C. v. Bradford Corp., [1936] 1 Ch. 375

U.S.A. v. Motor Trucks Ltd., [1924] A.C. 196

[1939] 1 All E.R. 662; 4 All E.R. 68

Correction of mistake which is not mutual

30 Beav. 445; 28 Ch.D. 255

parties at the time of its execution, the Chancery Division will rectify the written instrument in accordance with their true intent. This may be done even though the parties can no longer be restored exactly to the position which they occupied at the time when the contract was made, and even though the mistake has been embodied in a deed of conveyance. It is not necessary that this intention should have been expressed in a concluded and binding contract antecedent to the agreement which it is sought to rectify; it is sufficient to find beyond reasonable doubt a common continuing intention in regard to a particular provision or aspect of the agreement to which its terms do not give effect. Extrinsic, and, if necessary, parol evidence will then be admitted to ascertain the true intent of the parties, and this even though the contract is one which is required to be under seal or which the Statute of Frauds requires to be proved by written evidence; for 'when the written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the Statute'. A valuable statement of the principles on which the Court acts in rectification cases is given in the judgment of Simonds, J., in the case of *Crane v. Hegeman & Harris Co.*, with which the Court of Appeal expressed their entire agreement.

Where mistake is not mutual, extrinsic evidence has only been admitted in certain cases which appear to have been regarded as having something of the character of Fraud, and has been admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract or having the contract annulled. Instances of such cases are *Garrard v. Frankel*, or *Paget v. Marshall*, cited in the chapter on Mistake. They are cases in which the offeree knows that an offer is made to him in terms which convey more than the offeror means to convey, and endeavours by a prompt acceptance to take advantage of the mistake.

of the High Court a jurisdiction in 'all causes for the rectification or setting aside or cancellation of deeds or other written instruments'.

§ 4. *General Rules of Construction*

We have so far considered the mode in which the terms of a contract are ascertained: we have now to deal shortly with certain general principles which govern the construction of those terms, premising that the construction of a contract is always a matter of law for the Court to determine.

Construction a question of law

(1) Words are to be understood in their plain and literal meaning. This rule may sometimes lead to consequences which the parties did not contemplate, but it is followed, subject always to admissible evidence being adduced of a usage adding to or varying the usual meaning of the words.

(1) Words to be understood in their plain meaning
Mallan v. May, 13 M. & W. 517

(2) 'An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement*'; 'greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent.'

Ford v. Beech, 11 Q.B. 866

Rules (1) and (2) might seem to be in conflict, but they come substantially to this: men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The Courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words. Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties so far as it can be discerned.

(2) Subject to inference of intention from the whole document

General purport of rules of construction

Obvious mistakes in writing and grammar will be corrected by the Court.

Thorman
v. Dowgate
S.S. Co.,
[1910]
1 K B. 410

The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply. But this (the so-called *ejusdem generis* rule) is again only a canon of construction for the purpose of ascertaining what may be presumed to have been the meaning and intention of the parties to the contract. It is not a rule of law and is therefore subordinate to the parties' real intention and does not control it; and it will have no application if the parties, from a survey of the contract as a whole, can be shown to have intended a different interpretation to be given to the language which they have used.

Haigh v.
Brooks, 10
A & E 309

Words susceptible of two meanings receive that which will make the instrument valid. Where a document was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J. S., it was argued that this showed a past consideration; but the Court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance', or '*on condition* of your being in advance'.

Fowkes v
Manchester
Assurance
Association,
3 B. and S
at p 929

Words are construed most strongly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

§ 5. *Rules of Construction as to Time and Penalties*

Stipulations as to time:

at Common Law:

in Equity:

Where a time was fixed for the performance of his undertaking by one of the parties to a contract, the Common Law held this to be 'of the essence of the contract'. If the condition as to time were not fulfilled, the other party might treat the contract as broken and discharged.

Equity did not so regard a condition as to time, but inquired whether the parties when they fixed a date meant anything more than to secure performance within a reason-

able time. If this was found to be their intention the contract was not held to be broken if the party who was bound as to time did perform, or was ready to perform, his contract within a reasonable time.

The Judicature Act provides that stipulations as to time 'shall receive in all Courts the same construction and effect as they would have heretofore received in Equity'.

by
statute:
s. 25
sub-s. 7

The effect of this enactment seems to be confined to such contracts as were dealt with in the Chancery Courts before the Judicature Acts; and to apply the rule to mercantile contracts has been held to be unreasonable. In mercantile contracts the general rule is (in the absence of agreement to the contrary) that stipulations as to time, *except as to time of payment*, are essential conditions.

Reuter v.
Sala,
4 C P D 249.
Sale of
Goods Act,
s 10

PART IV

DISCHARGE OF CONTRACT

Discharge
of con-
tract,

WE have now dealt with the elements which go to the formation of contract, with the operation of contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.

how
effected

The modes in which a contract may be discharged are these.

Agree-
ment

(1) It may be discharged by the same process which created it, by mutual agreement.

Perform-
ance

(2) It may be performed; the duties undertaken by either party may be thereby fulfilled, and the rights satisfied.

Breach

(3) It may be broken: upon this a new obligation connects the parties, a right of action possessed by the one against the other.

Impossi-
bility

(4) It may become impossible, or performance of it may be 'frustrated', by reason of certain circumstances which are held to exonerate the parties from their respective obligations.

Operation
of Law

(5) It may be discharged by the operation of rules of law in certain sets of circumstances to be hereafter mentioned.

CHAPTER XII

Discharge of Contract by Agreement

CONTRACT rests on the agreement of the parties: as it is their agreement which binds them, so by their agreement they may be loosed.

Forms of discharge by agreement

And this mode of discharge may occur in one of three forms: by waiver; by the substitution of a new contract; or by the operation of some provision contained in the contract itself.

§ 1. *Waiver*

A contract may be discharged by agreement between the parties that it shall no longer bind them. This is a waiver, and effects a rescission of the contract.

Waiver

Such an agreement is formed of mutual promises, and the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, as often stated, that 'a simple contract may, before breach, be waived or discharged, without a deed and without consideration', must be understood to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities.

But there is no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where *A* has done all that he was bound to do and the time for *X* to perform his promise has not yet arrived, a bare waiver of his claim by *A* would be an effectual discharge to *X*.

Mere waiver of contractual rights invalid

According to English law the right to performance of a contract can be abandoned only by release under seal, or for consideration. The plea of 'waiver' under the old system of pleading set up an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Discharge by

Bullen and Leake, *Prec. of Pleadings*, Tit. Waiver; Rescission

Ande, p. 100

waiver, then, requires either a mutual abandonment of claims, or else a new consideration for the waiver.

Foster v. Dawber,
6 Exch. 851,
per Parke, B.

'It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by release under seal, or by performance of the obligation*, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts.'

Peculiar-
ity of bills
of ex-
change
and pro-
missory
notes

This last sentence deals with an exception to the principle just laid down, for it was a rule of the law merchant imported into the Common Law that the holder of a bill of exchange or promissory note might waive and discharge his rights. Such waiver needed no consideration, nor did it need to be expressed in any written form.

The Bills of Exchange Act, 1882, s. 62, has given statutory force to this rule of the law merchant, subject to the provision that the waiver must be in writing, or the bill delivered up to the acceptor.

§ 2. *Substituted Contract*

Substi-
tuted con-
tract may
be an
implied
discharge

A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one. The old contract may be expressly waived in the new one, or waiver may be implied by the introduction of new terms or new parties. This method of discharge is therefore a form of rescission with a new contract superadded.

Goss v. Lord Nugent,
5 B. & Ad.,
per Lord Denman,
C.J., at p.
64

'By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.'

In *Morris v. Baron* a dispute had arisen out of a contract for the sale of cloth and an action had been begun. Before the case came on for trial the parties made a parol arrangement of which the chief terms were that the action and counterclaim were to be withdrawn, an extension of credit was to be given to the buyer for a sum admittedly due from him under the old contract, and as regards the balance of goods contracted for but undelivered there was to be substituted for a firm contract of sale an option for the buyer to take them if he pleased. The House of Lords held that in these circumstances it must be concluded that the parties had agreed to abrogate the old contract and substitute a new one for it.

New
terms
sub-
stituted
[1918]
A.C. 1

Similarly the introduction of new parties may impliedly rescind an existing contract and substitute a new one for it.

Or new
parties
sub-
stituted

If *A* has entered into a contract with *X* and *M*, and these two agree among themselves that *M* shall retire from the contract and cease to be liable upon it, *A* may of course insist upon the continued liability of *M*; but if he continues to deal with *X* after he becomes aware of the retirement of *M*, his conduct will probably justify the inference that he has entered into a new contract to accept the sole liability of *X*, and he cannot then hold *M* to the original contract.

‘If one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditor, the old firm, and the new firm—be transferred to the new firm’, and this consent may be implied by conduct, if not expressed in words or writing.¹

Per Parke,
B, Hart v.
Alexander,
2 M. & W.
484

As regards the form needed for the expression of an agreement which purports to discharge an existing contract, there was a general rule that a contract must be discharged in the same form as that in which it was made. At Common Law a contract under seal could only be dis-

Form of
discharge
by agree-
ment

¹ In the case of partnership these rules are substantially embodied in the Partnership Act, 1890, s. 17.

charged by agreement expressed under seal: a parol contract might be discharged by parol.

(1) In case of contract under seal

But while at Common Law parties to a deed could only discharge their obligations by deed, they might make a parol contract creating obligations separate from and at variance with the deed, giving a right of action to which the deed furnishes no answer, and affording an equitable answer to an action on the deed.

Steeds v. Steeds, 22 Q.B.D. 537

Since the Judicature Acts the rule of Equity prevails, and a contract under seal may be rescinded by a parol contract.

(2) In case of parol contracts

A parol or simple contract, whether it be in writing or no, may be discharged by a subsequent agreement, either written or verbal. This is so, even when the original agreement is one required by statute to be evidenced by writing, for s. 4 of the Statute of Frauds and s. 4 of the Sale of Goods Act merely make certain contracts unenforceable by action unless they are in writing, but nothing in either of these Statutes requires those same contracts to be dissolved by writing. In *Morris v. Baron* the substituted contract was itself unenforceable because it did not comply with s. 4 of the Sale of Goods Act, but it operated none the less as a discharge of the old contract, and the buyer, who claimed damages for non-delivery of the goods alternatively under the original, and under the substituted, contract, was unable to succeed on either ground.

[1918] A.C. 1

The intention to discharge must be clear:
British & Beningtons Ltd. v. N.W. Cachar Tea Co. Ltd., [1923] A.C. 48
Berry v. Berry, [1929] 2 K.B. 316
Thornhill v. Neats, 8 C.B., N.S. 831

But the intention to discharge the first contract must be clear, for it is possible that in the second arrangement into which the parties have entered they may merely have intended to *vary* the terms of the original contract, and not to rescind it and substitute a wholly new contract for it.

A contract under seal may be varied, as it may be rescinded, by a parol contract. A simple contract, again, whether in writing or not, may be varied by a subsequent agreement, either written or verbal. But the distinction between a subsequent agreement which rescinds, and one which varies, the original contract becomes important when

the original contract is one *required by law* to be in writing. Such a case was *Goss v. Lord Nugent*.

5 B. & Ad.
65

By an agreement in writing the plaintiff had contracted to sell to the defendant several lots of land and to make a good title to them. It was afterwards discovered that a good title could not be made to one of the lots, and the defendant had verbally agreed to waive the title to that lot. The defendant later, relying on the defective title, refused to pay the purchase money, and it was held that the contract as varied could not be enforced since it was not wholly a contract in writing.

Whether there has been a mere variation of terms or a rescission must depend upon the facts of the particular case and is often not easy to determine; but the following test has been suggested by Lord Dunedin:

not a mere
variation
of terms:

'In the first case [variation] there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second [rescission] you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.'

Morris v.
Baron,
[1918]
A.C. 1, 26

The necessity of finding a clear indication of an intention to discharge the first contract is also illustrated in another class of cases. A mere postponement of performance, for the convenience of one of the parties, does not either discharge or vary the contract.

nor a
mere post-
ponement
of per-
formance

This question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance; that a new contract was thereby created, and that the new contract is unenforceable for non-compliance with statutory requirements as to form.

Hickman v.
Haynes, L.
R. 10 C.P.
606

Levey & Co.
v. Goldberg,
[1922]
1 K.B. 688

But the Courts have always recognized 'the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another', and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the measure of damages may be increased, as against him, by the addition of damages consequent on the delay.

§ 3. *Provisions for Discharge contained in the Contract itself*

A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms.

Discharge
optional
on non-
fulfilment
of a term

The first of these three cases is somewhat akin to discharge of contract by breach, a matter which is discussed hereafter. But there is a difference between a non-fulfilment contemplated by the parties, the occurrence of which they agree shall make the contract determinable at the option of one, and a breach, or non-fulfilment, not contemplated or provided for by the parties.

Head v.
Tattersall,
L.R. 7 Ex. 7

Head bought a horse of Tattersall. The contract of sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. The horse did not answer to its description and had never been hunted with the Bicester hounds. It was returned by the day named, but had in the meantime been injured, though by no fault of Head. Tattersall dis-

puted, but without success, Head's right to return the horse.

'The effect of the contract', said Cleasby, B., 'was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property revested, and he must therefore bear the loss.'

at p. 14

In the second case the parties introduce a provision that the fulfilment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract.

Occurrence of a specified event

Such a provision is called a 'condition subsequent'; it is well illustrated by a Bond, which is a promise subject to, or 'defeasible' upon, a condition expressed in the Bond.

Condition of Bond

It may be further illustrated within certain limits by the 'excepted risks' of a charter-party. The shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, 'the act of God, the King's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind, during the said voyage, always excepted'. If while the contract is in course of performance the ship is sunk by a peril of the seas, the shipowner commits no breach of contract by failing thereafter to carry out his contractual obligations; he is protected by the exception in the contract. In the above case the contract is obviously at an end and the parties are discharged; but the excepted peril may only partially affect performance or delay or hinder it, as if the ship should be laid up for a time for the purpose of repairs necessitated by bad weather. The ship-owner cannot be sued for damages caused by the delay, but the contract (unless the delay is so excessive as to frustrate the whole purpose of the adventure) is not discharged, and the shipowner must continue to perform it as soon as the repairs are completed. The

Excepted risks of charter-party
See form, Appendix A

Infra, p. 347

occurrence of an excepted peril does not therefore necessarily discharge the whole contract, though it may do so.

Limitations of carrier's liability

As an example of an implied provision providing for discharge in certain circumstances we may take the contract made by a 'common carrier'. Such a carrier has a Common Law liability imposed on him arising from the nature of his business, and is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he promises to bring the goods safely to their destination or to indemnify the owner for their loss or injury, whether happening through his own default or not. But his promise is defeasible upon the occurrence of certain excepted risks, —the 'act of God', the 'King's enemies', and also injuries arising from defects inherent in the thing carried. This qualification is implied in every contract made with a common carrier, and the occurrence of the risks exonerates him from liability for loss thereby incurred.

Lister v. Lancashire and Yorkshire Railway Co., [1903] 1 K.B. 878

'Act of God' is a phrase which needs explanation.

1 C.P.D. 423

In *Nugent v. Smith* the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant.

Meaning of phrase 'act of God'

It was argued that the weather, though rough, was not so violent or unusual as to be an 'act of God', and that the struggling of the mare was not of itself enough to show that she was injured from her own inherent vice; but the Court of Appeal (reversing the decision of the Common Pleas) held that the defendant was not liable.

at p. 444

'The "act of God"', said James, L. J., 'is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected of him. In this case the defendant has made this out.'

And Mellish, L. J., said, 'A carrier does not insure against acts of nature and does not insure against defects in the thing carried itself, but in order to make out a defence he must be able to prove that either cause taken separately or both taken together, formed the sole and direct and irresistible cause of the loss.' at p. 441

A common carrier is therefore discharged where an excepted risk occurs, if he shows that the loss could by no reasonable precaution in the circumstances have been prevented.

This exception from liability is a known and understood term in every contract which a common carrier makes. It may be called an implied term, but it would perhaps be more correct to say that it is a term which is annexed by law to a common carrier's contract. A term may, however, be implied in a contract, either because the written contract would be meaningless without it, or because it is impossible without implying it to give full effect to the intention of the parties. We shall see hereafter that the cases where a contract is said to be discharged by reason of a subsequent impossibility not expressly provided against in the contract are really cases in which a term has been implied that in certain events the contract shall be regarded as discharged. This subject will be discussed under the head of Impossibility of Performance.

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision is implied by custom in the ordinary contract of domestic service, which can be terminated either by a month's notice or the payment of a month's wages. Similar terms may be incorporated in other contracts between employer and employed, either expressly or by the usage of a trade; and even where the duration of a written contract is on the face of the instrument indefinite and unlimited, such a provision may sometimes be implied from the nature of the contract. Thus a partnership for no fixed term is determinable by notice.

Discharge optional with notice
Nowlan v. Ablett, 2 C.M. & R. 54

Parker v. Ibbetson, 4 C.B. & N.S. 347
Creditor Gas Co. v. Creditor U.D.C., [1928] 1 Ch. 447
Partnership Act, 1890, S. 26.

CHAPTER XIII

Discharge of Contract by Performance

Kinds of
perform-
ance;

WE must distinguish performance which discharges one of two parties from his liabilities under a contract, and performance which discharges the obligation in its entirety.

where
promise is
given for
executed
considera-
tion;

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract: all has been done on both sides that could be required to be done under the contract.

where
promise is
given for
promise

Where one promise is given in consideration of another, performance by one party does no more than discharge him who has performed his part. Each must have done his part in order that performance may be a *solutio obligationis*, and so if one has done his part and not the other, the contract is still in existence and may be discharged in any one of the ways we have mentioned.

Whether the alleged performance is a discharge to the party concerned must be a question to be answered, first by ascertaining the *construction* of the contract, so as to see what the parties meant by performance, and then by ascertaining the facts, so as to see whether that which has been done corresponds to that which was promised. But two sorts of Performance should be briefly noticed: these are Payment and Tender.

§ 1. *Payment*

Payment
as a mode
of dis-
charge,

Payment may be a discharge of the original contract between the parties, or of an agreement substituted for such contract.

of original
contract,

If in a contract between *A* and *X* the liability of *X* consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges *X* by the performance of his agreement.

of substi-
tuted con-
tract,

Or if *X*, being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having

to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with A to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. The new contract discharges the old one, and payment is a performance of X's duties under the new contract, and, for him, a consequent discharge.

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation thus formed may be discharged by 'accord and satisfaction', an agreement the consideration for which is usually (but not necessarily) a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.

of liability
arising
from
breach of
contract

Infra, p. 382

Payment, then, may be performance (1) of an original contract, or (2) of a substituted contract, or (3) of a contract in which payment is the consideration for the renunciation of a right of action.

✓
A negotiable instrument may be given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it; and the giving of such an instrument in payment of a liquidated or unliquidated claim is the substitution of a new agreement for the old one; but it may affect the relations of the parties in either one of two different ways. The giver of the instrument may be discharged from his previous obligation either absolutely or conditionally.

Nego-
tiable
instru-
ment as
payment;

A may take the bill or note, and promise, in consideration of it, expressly or impliedly to discharge X altogether from his existing liabilities. In such a case he relies upon his rights conferred by the instrument, and, if it be dishonoured, must sue on it, and cannot revert to the original cause of action. But the presumption, where a negotiable instrument is taken in lieu of a money payment, is, that the parties intend it to be a conditional discharge only.

may be an
absolute,

Sard v.
Rhodes, 1
M. & W. 153
Re Romer &
Haslam,
[1893]
2 Q.B. *per*
Lord Esher,
M.R., at
p. 296

or con-
ditional
discharge

Sayer v.
Wagstaff, 5
Beav. 423

Their position, then, is this: *A*, having certain rights against *X*, has agreed to take a negotiable instrument instead of immediate payment or immediate enforcement of his right of action; so far *X* has satisfied *A*'s claim. But if the bill be dishonoured at maturity, the consideration for *A*'s promise has wholly failed and his original rights are restored to him. The agreement is 'defeasible upon condition subsequent'; the payment by *X* which is the consideration for the promise by *A* is not absolute, but may turn out to be, in fact, no payment at all.

Robinson
v. Read,
9 B. & C.
at p. 455

Sayer v.
Wagstaff, 5
Beav. 423

Payment, then, consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of evidence to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.

§ 2. *Tender*

Tender is
of two
kinds

Tender is attempted Performance; and the word is applied to attempted performance of two kinds, dissimilar in their results. It is applied to a performance of a promise to do something, and of a promise to pay something. In each case the performance is prevented by the act of the party for whose benefit it is to take place.

Tender of
goods

Startup v.
Macdonald,
6 M. & G.
593

Sale of
Goods Act,
1893, s. 37

Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.

Tender of
payment

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may

form a good defence to an action by the creditor, does not constitute a discharge of the debt.

The debtor is bound in the first instance 'to find out the creditor and pay him the debt when due'; if the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.

Walton v.
Mascall,
13 M. & W.
458

Dixon v.
Clarke, 5
C.B. 377

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, while the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender.

Tender of payment, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment. And the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change.¹

Finch v.
Brook,
1 Bing,
N.C. 253

'Great importance', it was said, 'was attached to the production of the money, as the sight of it might tempt the creditor to yield.' But a modern case makes it probable that a genuine offer to pay, even without the production of ready cash, will now be regarded as a good tender.

Farquharson
v. Pearl As-
surance Co.,
[1937] 3 All
E.R. 124

¹ The Statutes which define legal tender are these: The Bank of England Act, 1833, s. 6, and the Currency and Bank Notes Act, 1928, which enact that Bank of England notes are legal tender, those for £1 and 10s. being legal tender even by the Bank itself; and the Coinage Act, 1870, s. 4, which enacts that the coinage of the Mint shall be legal tender as follows:—gold coins, to any amount; silver coins, up to forty shillings; bronze coins, up to one shilling.

CHAPTER XIV

Discharge of Contract by Breach

§ 1. *Meaning of Discharge by Breach*

Breach of contract

If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this, there are circumstances in which the breach not only gives rise to a cause of action but will also *discharge* the injured party from such performance as may still be due from him.

Does not itself discharge, but may confer option on injured party

Heyman v. Darwins,
[1942] A.C.
356, 374,
397

In such cases it is common, but it is not strictly accurate, to speak of the contract as having been 'discharged' by the breach. But this phrase, though convenient, is a loose one. A breach does not of itself alter the obligations of either party under the contract; what it may do is to justify the injured party, if he chooses, in regarding himself as absolved or discharged from the further performance of his side of the contract. But even if he does so choose, that again does not mean that the contract itself is discharged or rescinded, if those terms are taken to imply that it is thereupon brought to an end and ceases to exist for all purposes; the contract still survives, though only, as it has been said, 'for the purpose of measuring the claims arising out of the breach'; for example, as happened in the case in which these words were used, it may still be necessary to refer to the contract for the purpose of ascertaining the damages due under the terms of an arbitration clause which the contract contains.

It is often difficult to ascertain whether or no a breach of one of the terms of a contract gives such an option to the party who suffers by it. But the general principle is, in the words of Lord Blackburn, this:

Mersey Steel & Iron Co. v Naylor,
9 App. Cas.
at p. 443

'Where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the

foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct".

We have, therefore, to ask, what are the circumstances which give rise to this situation? What is the nature of the breach which gives the injured party the right to treat himself as absolved from future performance under the contract?

§ 2. *Forms of Discharge by Breach*

The right to treat a contract as *wholly* discharged may arise in any one of three ways: the other party to the contract (1) may renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfil them, (3) may fail to perform what he has promised. In each of these three cases he has repudiated his contractual obligations. In the first case, he has expressly repudiated them; in the second, he has repudiated them by conduct; in the third, he has repudiated them by a total or substantial failure to perform them, and not the less because his failure may not have been wilful or deliberate. In each case, provided that the repudiation goes, in the words of Lord Blackburn, 'to the root of the contract'—a phrase the meaning of which we shall consider later—the injured party may treat his own obligations as ended.

Modes in which the right may arise

Of these forms of breach the first two may take place not only in the course of performance but also while the contract is still wholly executory, i.e. before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract.

(1) *Renunciation*

This may take place either before performance is due or during performance itself.

Renunciation before performance is due

(a) The parties to a contract which is wholly executory have a right to something more than a performance of the

contract when the time arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

The renunciation of a contract by one of the parties before the time for performance has come, does not of itself put an end to the contract, for there must be two parties to a rescission, but it discharges the other, if he so choose, and entitles him at once to sue for a breach. A contract is a contract from the time it is made, and not from the time that performance of it is due.

Michael v.
Hart, [1902]
1 K.B. per
Collins,
M.R., at
p. 490

2 E. & B.
678

Hochster v. Delatour is the leading case upon this subject. *A* engaged *X* upon the 12th of April to enter into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1851. On the 11th of May *A* wrote to *X* to inform him that he should not require his services. *X* at once brought an action, although the time for performance had not arrived. The Court held that he was entitled to do so.

Frost v.
Knight, L.
R. 7 Ex. 114
is a dis-
charge
even if
perform-
ance
be con-
tingent,

The sense of the rule is very clearly stated by Cockburn, C. J., in a case which goes somewhat farther than *Hochster v. Delatour*. In that case a time was fixed for performance, and before it arrived the defendant renounced the contract; but in *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties.

L.R. 7 Ex.,
at p. 114

A promised to marry *X* upon his father's death, and during his father's lifetime renounced the contract; *X* was held entitled to sue upon the ground explained above. 'The promisee', said Cockburn, C. J., 'has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its unimpaired and unimpeached efficacy may be essential to his interests.'

If, however, the promisee refuses to accept the renunciation, and continues to insist (as he has a right to do) on the performance of the promise, the contract remains in exis-

tence for the benefit and at the risk of both parties, and if anything occurs subsequently to discharge it from other causes, the promisor, whose renunciation has been refused, may nevertheless take advantage of such discharge.

provided
it is
treated
as a
discharge
4 E & B
714

Thus in *Avery v. Bowden*, *A* agreed with *X* by charter-party that his ship should sail to Odessa, and there take a cargo from *X*'s agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but *X*'s agent refused to supply one. Although the days within which *A* was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a repudiation of the contract and sailed away. *A* would then have had a right to sue at once upon the contract. But the master of the ship continued to demand a cargo, and before the 'lay' or 'running' days¹ were out—before, therefore, a breach by non-performance had occurred—a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards *A* sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and *as the agent had not accepted the renunciation*, *X* was entitled to take advantage of the discharge of the contract brought about by the declaration of war.

(b) If during the performance of a contract one of the parties by word or act definitely refuses to continue to perform his part in some essential respect, the other party is forthwith exonerated from any further performance of his promise, and is at once entitled to bring his action.

Renuncia-
tion dur-
ing per-
formance

In *Cort v. The Ambergate Railway Company*, Cort contracted with the defendant Company to supply them with 3,900 tons of railway chairs at a certain price, to be delivered in certain quantities at specified dates. After 1,787 tons had been delivered, the Company desired Cort to deliver no more, as they would not be wanted. He brought an

17 Q B. 127

¹ See Appendix A.

action upon the contract, averring readiness and willingness to perform his part, and that he had been prevented from doing so by the Company. He obtained a verdict, and when the Company moved for a new trial on the ground that Cort should have proved not merely readiness and willingness to deliver, but an actual delivery, the Court held that where a contract was renounced by one of the parties, the other need only show that he was willing to have performed his part.

at p. 148

‘When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract.’

[1909] A.C.
118

In *General Bill-posting Co. v. Atkinson*, the defendant contracted to serve the Company and also not to compete with them for a certain period after the termination of his engagement. The Company having dismissed him wrongfully without notice, the House of Lords held that not only was he thereby released from his obligation to serve them, but that he was no longer bound by his covenant not to compete.

(2) *Impossibility created by the act of one party to the contract*

Impossi-
bility
created
before per-
formance

Here also the impossibility may be created either before performance is due or in the course of performance.

(a) If *A*, before the time for performance arrives, makes it impossible that he should perform his promise, the effect is the same as though he had renounced the contract.

Lovelock v.
Franklyn,
8 Q B. 371

A promised to assign to *X*, within seven years from the date of the promise, all his interest in a lease. Before the end of seven years *A* assigned his whole interest to another person. It was held that *X* need not wait until the end of seven years to bring his action:

‘The plaintiff has a right to say to the defendant, You have

placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract.'

A chartered a ship to X, the ship to be placed at X's disposal as soon as she was released from the Government service in which she was at the time engaged. Before her release A sold her to another person. It was held that as he had put it out of his power to perform thereafter his contract with X, the contract was at an end and X might bring an action for damages forthwith. It was argued that A might have bought the ship back in time to place her at X's disposal, but this was regarded as too speculative a possibility to take into account.¹

Omnum d'Entreprises v Sutherland,
[1919]
1 K.B. 618

(b) The rule of law is similar in cases where one party during performance has by his own act made the complete performance of the contract impossible.

An Englishman was engaged by the captain of a warship owned by the Japanese Government to act as fireman on a voyage from the Tyne to Yokohama. In the course of the voyage the Japanese Government declared war with China, and the Englishman was informed that a performance of the contract would bring him under the penalties of the Foreign Enlistment Act. It was held that he was entitled to leave the ship and sue for the wages agreed upon, since the act of the Japanese Government had made his performance of the contract legally impossible.

Impossibility created during performance
O'Neil v Armstrong,
[1895]
2 Q.B. 418

Ogdens Ltd. v. Nelson is a further authority for the proposition that where there is an express promise to do a certain thing for a certain time, the promisor, if he puts it out of his power to continue performance of his promise, is liable to an immediate action for damages.

[1905]
A.C. 109

¹ It may be noted that in this case the buyer of the ship had no notice of the charter-party at the time of the sale. If there had been notice, it seems that the plaintiff might have enforced the charter-party against the buyer on the principle of the *Strathcona* case.

[1926]
A.C. 108,
ante, p. 252

(3) *Failure of performance*

Breach
may dis-
charge

When one party to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so, he thereby releases the other from the contract and its obligations. One of two parties is not required to tender performance when the other has by act or word indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised.

or only
give right
of action

But one of the parties may claim that though he has broken a promise wholly or in part, yet his breach does not entitle the other to rescind the contract and to regard himself as discharged from his own liabilities under it. We shall find that to answer this question we must discuss the following matters.

(a) We have to ascertain whether the promise of the party injured was given conditionally on the performance by the other of that in which he has made default. If it was, he is discharged from his promise: if it was not, he must perform his promise, and bring an action for the damage occasioned by the default of the other.

Conditions
con-
current
and
precedent

If *A* and *X* agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the obligation to perform each promise is dependent or conditional on this concurrence of readiness and willingness to perform the other; their mutual promises are *concurrent* conditions. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time.

Again, if *A* and *X* agree that the performance of *A*'s promise is to be conditional on the *prior* performance of *X*'s, then the performance by *X* of his promise is a condition *precedent* to the obligation of *A* to perform his promise.

It is only if *X* has broken a promise which falls into one

or other of these two classes that the breach will relieve *A* of the obligation to keep his own promise and enable him to treat the contract as at an end.

On the other hand, the promise which *X* has broken may not be a condition on which the obligation of *A* to fulfil his promise was intended by the parties to depend; it may be a promise which is independent of that of *A*, a 'warranty' as it is usually called, in which case *A* must fulfil his promise whether or not *X* fulfils his. That is but another way of saying that in such a case *A* is not entitled to treat the contract as discharged; he is limited to his remedy in damages for *X*'s breach.

(*b*) Even where the obligation of *A* to fulfil his promise is dependent or conditional upon the fulfilment of his promise by *X*, it is not every failure on the part of *X* to fulfil his promise that will entitle *A* to put an end to the contract. The promise which *X* has broken may be a 'divisible' promise, in the sense that it is capable not only of complete performance, but of performance in part to a greater or less degree. It may, for example, be a promise to do a number of successive acts, or to do a single act which is capable of being partly done and partly left undone. Here the *degree* of default of which *X* has been guilty is relevant. A failure by *X* to perform a part of his promise will give a right of action to *A*; but it will not necessarily discharge *A* from the performance of his own obligations under the contract. We have to inquire, therefore, what degree of failure by *X* will entitle *A* to say that the consideration for which he made his promise has in effect wholly failed and that he will not, and is not bound to, perform that which he had undertaken to perform.

Before entering on a more detailed consideration of these matters we may note that if the breach of a contract by one party has been such as to entitle the other to treat the contract as discharged, it does not matter that the other in electing to do so purports to do so on an insufficient ground. So if a man were to dismiss his servant for some reason

Divisible
promises

Ridgway v.
Hungerford
Market Co.,
3 Ad. & E.
171

British &
Benington's v.
N.W. Cachar
Tea Co.,
[1923] A.C.
per Lord
Sumner, at
p. 70

which would not justify the dismissal, and were afterwards to discover that the servant had been guilty of theft or drunkenness, he may rely on this as a justification if the servant should bring an action against him for wrongful dismissal.

(a) *Conditions and Warranties*

Contracts are often made up of various statements and promises on both sides, differing in character and in importance; the parties may regard some of these as vital, others as subsidiary, or collateral, to the main purpose of the contract. Where one of these is broken the Court must discover, from the tenor of the contract or the expressed intention of the parties, whether the broken term was vital or not. This is a matter for the Court to determine, and not a question of fact for the jury.

If the parties regarded the term as essential, it is a Condition: its failure entitles the other party to treat the contract as discharged. If they did not regard it as essential, but as subsidiary or collateral, it is a Warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term. Thus from one point of view a warranty may be regarded as a promise of indemnity against a failure to perform a particular term of the contract.

Wallis v.
Pratt, [1910]
2 K.B. at
p. 1012

Vital
statement

Warranty and Condition alike are parts, and only parts, of a contract consisting in various terms.

3 B. & S. 751
Supra, p. 170

Bearing in mind that a Condition may assume the form either of a promise that a thing *is* or of a promise that a thing *will be*, we find a good illustration of the former in *Behn v. Burness*, where a ship was stated in the contract of charter-party to be 'now in the port of Amsterdam', and the fact that the ship was not in that port at the date of the contract discharged the charterer.

Vital
promise
2 M. & G.
257

The second kind of Condition is illustrated by the case of *Glaholm v. Hays*. A vessel was chartered to go from England to Trieste and there load a cargo, and the charter-

party contained this clause: 'the vessel to sail from England on or before the 4th day of February next.'

The vessel did not sail for some days after the 4th of February, and on its arrival at Trieste the charterer refused to load a cargo and repudiated the contract. The judgment of the Court was thus expressed:

'Whether a particular clause in a charter-party shall be held to be a condition upon the non-performance of which by the one party the other is at liberty to abandon the contract and consider it at an end, or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent.'

The nature of a Warranty as compared with a Condition is illustrated by the case of *Bettini v. Gye*. Bettini entered into a contract with Gye, director of the Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a considerable time and on a number of terms. Among these terms was an undertaking that he would be in London six days at least before the commencement of his engagement, for rehearsals. He only arrived two days before his engagement commenced, and Gye thereupon threw up the contract.

Warranty
1 Q B D.
183

Blackburn, J., in delivering the judgment of the Court, described the process by which the true meaning of such terms in contracts is ascertained.

First he asked, does the contract give any indication of the intention of the parties?

'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one: or they may think that the performance of some matter apparently of essential importance and prima facie a condition precedent is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.'

Bettini v. Gye,
1 Q B.D.
187

He found in the contract no such expression of the intention of the parties; this being so, the interpretation of the disputed term remained for the Court. The Court pointed out that if the engagement had been only to sing in operas, or if it had been only for a few performances, the term as to rehearsals might well have been vital to the contract, but in all the circumstances of this particular contract they held that it was not a condition; its breach therefore did not operate as a discharge and could be compensated by damages.

1 Q B D.
410

With this case we may contrast *Poussard v. Spiers & Pond* where, on a contract somewhat similar in subject-matter to that in *Bettini v. Gye*, the failure of an artiste to attend rehearsals and the first performance of a new piece in which she was to take the principal female part was held to go to the root of the consideration and to discharge the defendants.

ss. 33-41

Lord Abinger, C.B., in
Chanter v
Hopkins,
4 M & W.
404

Lord Hal-
dane in
Dawsons v.
Bonnin,
[1922] 2
A C 413,
422

It is right to observe that the word Warranty is used in a variety of senses, and that in many of the earlier cases and also in insurance law the term is not infrequently convertible with Condition. It is so used in the Marine Insurance Act, 1906. But later usage gives it generally the meaning assigned to it in this chapter. 'A warranty is an express or implied statement of something which the party undertakes shall be a term in the contract and, though part of the contract, collateral to the express object of it'; or, to take a definition from a more recent case, 'the proper significance of the word in the law of England is an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such contract'.

A breach
of condi-
tion
turns it
into a
warranty

One cause of the confusion which overhangs the use of the term warranty arises from the rule that a condition may, as it were, change its character in the course of the performance of a contract; a condition the breach of which would have effected a discharge if treated so at once by

the promisee, ceases to be a condition if he goes on with the contract and takes a benefit under it. It is then called a warranty *ex post facto*. Graves v. Legg, 9 Ex. 717

This aspect of a condition is well illustrated by the case of *Pust v. Dowie*. A vessel was chartered for a voyage to Sydney; the charterer promised to pay £1,550 for this use of the vessel on condition of her taking a cargo of not less than 1,000 tons weight and measurement. He had the use of the vessel as agreed upon; but she was not capable of holding so large a cargo as had been made a condition of the contract. He refused to pay the sum agreed upon, pleading the breach of this condition. The term in the contract as to weight and bulk of cargo was held to have amounted, in its inception, to a condition; but as a substantial part of the consideration had been received by the charterer, it was held that he could not treat it as a condition, but only as a stipulation for breach of which damages might be obtained. 5 B. & S. 33

‘The case’, said Erle, C. J., ‘falls within the principle that where the whole or any substantial part of the consideration for the promise of the one party has been received by the other, the latter cannot treat it as a condition, but as a stipulation for breach of which he may obtain compensation in damages. Here the hull of the ship has been placed at the disposal and service of the charterer, and if there were matter by reason of which he might have refused to take the ship, or for which he might be indemnified in reduction of damages when he has put on board a cargo, still he cannot be allowed to say that he will not pay anything.’

The Sale of Goods Act, 1893, which codifies the law relating to the contract of sale of goods, affords instructive illustrations of the nature and importance of the distinction between conditions and warranties; and its provisions are of such constant application that they deserve to be treated in some detail even in a work which is concerned with the general principles of contract and not with the law of special contracts. Sale of Goods

The terms ‘condition’ and ‘warranty’ are used in the Act in the senses given above; that is to say, a condition is a stipulation the breach of which gives rise to a right to

ss 11 (1) (b)
and 62

treat the contract as repudiated, a warranty is one the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation is one or the other depends in each case on the construction of the contract; but it is laid down that stipulations as to time of payment are, unless a different intention appears, not deemed to be of the essence of the contract. Other stipulations as to time will usually be conditions, at any rate in mercantile transactions.

s. 20
Chalmers,
Sale of
Goods Act,
11 ed., p. 41

We have already seen, however, that it is possible for a condition to change its character in the course of the performance of a contract, and that the party injured by its breach may sometimes lose his right to treat the contract as repudiated and have to fall back on his remedy in damages; in other words he may have to treat the breach of a condition as if it had been the breach of a mere warranty.

Warranties *ex post facto*

Section 11 specifies three cases in which this may happen in a contract of sale of goods.

s 11 (1) (a)

(1) 'Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.'

s 11 (1) (c)

(2) 'Where a contract of sale is not severable and the buyer has accepted the goods, or part thereof,

(3) or where the contract is for specific goods, the property in which has passed to the buyer,

the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.'

Two points require explanation as regards the second of these cases.

Acceptance in performance of contract
Supra, p. 83

(a) 'Acceptance' in this connexion is quite different from 'acceptance' within the meaning of s. 4. The 'acceptance' which has the effect of taking away the right to reject the goods occurs when the buyer 'intimates to the seller that he has accepted them, or when the goods have

been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them'. s. 35

(b) We must observe that 'acceptance' does not necessarily have this effect if the contract is severable, that is to say, if delivery of the goods is to be made by instalments. In such a case the Act provides that if 'the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated'. s. 31 (2)

The parties to a contract of sale of goods may of course include in the contract such terms, whether conditions or warranties, as they may agree upon. But the contract is of such everyday occurrence, and it is commonly made with so little consideration of the exact legal results which the parties would desire to produce by it, that if their rights and obligations were to be determined only by what they say or do when they make the contract their reasonable expectations would often be defeated. Consequently certain conditions and warranties are *implied* by the Act in a contract of sale. Implied conditions

Where the contract is by description, there is an implied condition that the goods shall correspond with the description. s. 13

Where it is by sample there are implied conditions (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) that the goods shall be free from any defect, rendering them unmerchant- s. 15 (2)

able, which would not be apparent on reasonable examination of the sample.

s. 13

If the sale is by sample as well as by description, it is not sufficient that the bulk of the goods should correspond with the sample if they do not also correspond with the description.

[1911]
A.C. 394

Wallis v. Pratt was a case of sale by sample and description. A sample of seed was described as 'common English sainfoin', whereas it was in fact 'giant sainfoin', a seed indistinguishable from, but inferior to, the former. The vendors delivered giant sainfoin, and the buyers accepted it believing it to be common English sainfoin. They resold it to other parties, to whom they had to pay damages for the mistake, which was discovered only when the seed came up. There was therefore a clear breach of the condition implied by s. 13, and the buyers would have been entitled to return the seed if they had discovered the mistake in time. But they had, of course, accepted the goods, and therefore by s. 11 (1) (c) could only treat the breach of condition as a breach of warranty; and there was an express provision in the contract that 'the seller gives no warranty, express or implied as to growth, description, or any other matters'. The House of Lords held, however, that though the buyers must treat the broken condition as if it had been a warranty, it did not thereby *become* a warranty so as to be excluded by this clause. Accordingly the buyers were entitled to recover damages for the breach of the condition, including a sum in respect of what they had had to pay to the parties to whom they had resold the seed.

The general rule of a contract of sale, as of other contracts, is 'caveat emptor'. Ordinarily, therefore, there is no implied condition or warranty of the quality of goods sold or of their fitness for any particular purpose. But the Act contains important qualifications of this principle, one of which we have already seen in s. 15 (2) (c). Others are the following:

s. 14 (1)

'(1) Where the buyer, expressly or by implication, makes known

to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.'

Chapronière v. Mason illustrates the meaning of this section. The plaintiff bought a bath bun at the defendant's shop, and when he bit the bun, one of his teeth struck a stone and was broken by it. It is clear that one who buys a bun from a baker makes known to him by implication that he requires it for the particular purpose of eating; that in such a case the buyer relies on the baker's skill or judgment; and that buns are goods which it is in the course of a baker's business to supply. In this case, therefore, there was an implied condition that the bun should be reasonably fit for eating, and the Court of Appeal thought that the presence of a stone in a bath bun was evidence that it was not so.

The principle embodied in this sub-section is not limited to contracts for the sale of goods. It has been held to be equally applicable to a contract to do work and supply materials (in this case the repair of a motor car), when the circumstances show that the person giving the order relies on the contractor's skill and judgment.

'(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality;

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.'

In *Wren v. Holt* the defendant kept a beer house in

21 T.L.R.
633

G H Myers
& Co. v.
Brent Cross
Service Co.,
[1934]
1 K.B. 46

s 14 (2) (3)
& (4)

[1903]
1 K.B. 610

which, as the plaintiff was aware, only X's beer was supplied. The beer supplied to the plaintiff contained arsenic and his health was injured by drinking it. The jury found as a fact that the plaintiff did not rely on the skill or judgment of the defendant for the quality of his beer, and the case therefore did not fall within s. 14 (1). But it was held that the plaintiff having asked for X's beer, the case fell within s. 14 (2). The beer was bought by description from a seller who dealt in beer of that description; it was not of merchantable quality; the defect could not have been revealed by examination. The plaintiff having, however, 'accepted' the beer, necessarily had to treat the breach of condition as a breach of warranty, for which he recovered £50 damages.

(b) Divisible promises: what degree of failure of performance discharges the contract?

Divisible
promises

It is plain that a total failure by A to do that which was the entire consideration for the promise of X, and which should have been done before the performance of X's promise fell due, will exonerate X. But it may be that A has done something, though not all that he promised; or the performance of a contract may extend over a considerable time during which something has to be done by both parties, as in the case of delivery of goods and payment of their price by instalments. Here we deal with questions of degree. Has one party so far made default that the consideration for which the other gave his promise has in effect wholly failed?

Delivery
and pay-
ment by
instal-
ments

The best illustrations of divisible promises are to be found in contracts to deliver and pay for goods by instalments. Where these are numerous, and extend over a long time, a default either of delivery or payment does not necessarily discharge the contract, though it must, of course, in every case give rise to an action for damages.

Failure to
accept:

In *Simpson v. Crippin* it was agreed that 6,000 to 8,000 tons of coal should be delivered in twelve monthly instal-

ments, the buyer to send wagons to receive them: the buyer sent wagons for only 158 tons in the first month, but the seller was not held entitled to rescind the contract.

L R 8 Q B
14

In *Freeth v. Burr* there was a failure to pay for one instalment of several deliveries of iron, under an erroneous impression on the part of the buyer that he was entitled to withhold payment as a set-off against damages for non-delivery of an earlier instalment. In the *Mersey Steel and Iron Co. v. Naylor* there was a similar failure to pay for an instalment, under an impression that, the appellant company having gone into liquidation, there was no one to whom payment could safely be made when the instalment fell due. In neither case was the seller held entitled to repudiate the contract by reason of the default.

L R, 9 C P.
208

failure to
pay:

9 App. Ca.
434

In none of the cases just cited did the breach, in the particular circumstances in which it had been committed, indicate, in the view taken by the Court, an intention in the party in fault to throw up the contract altogether, and thereby to set the other party free.

On the other hand, in a case where 2,000 tons of iron were to be delivered in three monthly instalments, and the buyer had failed to take delivery of any during the first month, it was held that the seller might refuse to go on with the contract. The Court thought that in these circumstances to compel the seller to go on with the contract would be to hold him to something different from that to which he had agreed.

failure to
deliver
Houck v
Muller, 7
Q.B D' 92

The question of degree may appear in other forms. In a charter-party containing a promise to load a *complete* cargo the contract is not necessarily discharged because the cargo loaded is not complete.

Incom-
plete per-
formance
Ritchie v.
Atkinson, 10
Last 308

Again, a term in the charter-party that a ship should arrive at a certain place at a certain day, or should use all due diligence to arrive as soon as possible, is one which admits of greater or less failure in performance, and according to the circumstances such failure may or may not discharge the charterer.

Freeman v.
Taylor, 8
Bing 124

Questions
to be
solved

The question to be answered in all these cases is one of fact; the answer must depend on the terms of the contract and the circumstances of each case. The question assumes one of two forms—does the failure of performance amount in effect to a renunciation on his part who makes default? does it go so far to the root of the contract as to entitle the other to say, ‘I have lost all that I cared to obtain under this contract; further performance cannot make good the past default’?

Withers v.
Reynolds,
2 B. & A.
882

Bloomer v.
Bernstein,
L.R. 9 C.P.
588

Cutter v.
Powell, 6
T.R. 320

Sometimes the answer to the question is provided by the parties themselves. The party who makes the default may so act as to leave no doubt that he will not or cannot carry out the contract according to its terms.

Or again, the parties may expressly agree that though the promises on both sides are in their nature divisible, nothing shall be paid on one side until after entire performance has taken place on the other. In such case the Courts are relieved of the task of interpretation.

But if the parties have not provided an answer, we come back to the question of fact; was the breach so substantial as to go to the root of the whole contract? or, at any rate, was it such that an intention to repudiate the contract may be inferred from it? The rule was stated very clearly by Bigham, J., in *Millar's Karri Co. v. Weddel*, a case of a contract to deliver by instalments:—

100 L. 1.
128

‘If the breach is of such a kind or takes place in such circumstances as *reasonably to lead to the inference* that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what will happen; he can at once cancel the contract and rid himself of the difficulty.’

And in a later case the Court of Appeal, after reviewing

the authorities, concluded that the main tests to be considered in such cases are, 'first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated'.

Maple Flock
Co. v. Uni-
versal Fur-
niture
Products,
Ltd., [1934]
1 K.B. at
p 157

CHAPTER XV

Impossibility of Performance¹

IMPOSSIBILITY of performance may appear on the face of the contract, or may exist, unknown to the parties, at the time of making the contract, or may arise after the contract is made. It is with this last sort of impossibility that we have here to do.

Unreality of consideration
Supra, p. 93 Where there is obvious physical impossibility, or legal impossibility apparent upon the face of the promise, there is no contract, because such a promise is no real consideration for any promise given in respect of it.

Mistake
Scott. v. Coulson,
[1903]
2 Ch. 249
Supra, p. 146 Impossibility which arises from the non-existence of the subject-matter at the time of the contract avoids it, when, as may usually be presumed, both parties have contracted on an assumption, which turns out to be false, that the subject-matter does exist. The contract then is void on the ground of mutual mistake.

Subsequent impossibility
Taylor v. Caldwell,
3. B. & S. *per* Blackburn,
J., at p. 833 Impossibility which arises subsequently to the formation of a contract does not of itself excuse the promisor from performance; for 'where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has been unexpectedly burthensome or even impossible'.

Paradine v. Jane,
Aleyn, 26 Paradine sued Jane for rent due upon a lease. Jane pleaded 'that a certain German Prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled and held out of possession . . . whereby he could not take the profits'.

¹ The matters treated in this chapter have been much discussed in recent legal literature, e.g. McElroy and Williams, *Impossibility of Performance*; McNair, *Legal Effects of War*; Webber, *Effect of War on Contracts*.

The plea, then, was in substance that the rent was not due because the lessee had been deprived, by events beyond his control, of the profits from which the rent should have come. But the Court held that this was no excuse

‘When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.’

The case suggested by the concluding words of the above quotation did in fact occur during the first Great War, a house being damaged by a bomb discharged by an enemy aeroplane, and it was held that, in accordance with the judgment in *Paradine v. Jane*, the lessee must repair the damage.

Redmond
v. Dainton,
[1920]
2 K.B. 256,
and see
Matthey v.
Curling,
[1922]
2 A.C. 180

Modern illustrations of the rule are to be found in the promise made by the charterer of a vessel to the shipowner that the cargo shall be unloaded within a certain number of days or payment made as ‘demurrage’.

See note to
Appendix A

A cargo of timber was agreed to be made up into rafts by the master of the ship, and in that state removed by the charterer. Storms prevented the master from doing his part, but this default did not release the charterer from his promise to have the cargo unloaded within the time specified. So, too, a dock strike affecting the labour engaged both by shipowner and charterer does not release the latter. He makes ‘an absolute contract to have the cargo unloaded within a specified time. In such a case the merchant takes the risk.’ It need hardly be said that the parties may, if they choose, provide expressly in their contract against such risks, and, as a matter of fact, they commonly do so, the tendency in modern charter-parties being always to expand the list of excepted risks.

This v.
Byers,
1 Q.B.D. 244

Budgett v.
Binnington,
[1891]
1 Q.B. 35

But the rule that impossibility of performance does not excuse the promisor applies only where a promise is positive and absolute, not subject to any condition express

Doctrine
of implied
term

Supra, p. 311

or implied. We have already spoken of what are termed 'conditions subsequent' and 'excepted risks', whereby the parties introduce an express provision that the fulfilment of a condition or occurrence of an event may discharge one or both of them from further liabilities under the contract, and what was then said may serve to explain the principles which we must now discuss. For just as the parties may *expressly* make the obligation to perform a contract conditional upon its continued possibility, so there are cases in which a contract, though containing no such express provision, will be interpreted by the Courts as containing such a provision by implication. And where a promise is, either expressly or by implication, conditional and not absolute, then, if the condition on which the obligation to perform it depends is not fulfilled, the promisor will be excused.

[1916]
2 A C 397,
403

The following passage from the judgment of Lord Loreburn in *Tamplin v. Anglo-Mexican Co.* explains the reasons on which this doctrine of the 'implied term' is based:

'A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. . . . Sometimes it is put that performance has become impossible, and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at the bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted. . . . Were the altered circumstances such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, "If that happens, of course it is all over between us"? What, in fact, was the true meaning of the contract?'

This passage has often been cited in later cases, and it is accepted by a preponderance of judicial opinion as a correct statement of the law. But there is some authority for another view of the nature of the 'implied term' which discharges the contract in these cases. In itself that phrase is ambiguous. It may mean a term which, although the parties have not expressed it, the Court reads into their contract, not in order to modify their agreement, but in order to give effect to what it regards as their real intention, and this is clearly the sense in which Lord Loreburn was using it. But it may also mean a term which, in the circumstances that have arisen, a positive rule of the law requires the Court to import into the contract, from, so to speak, the outside, irrespective of the intention of the parties. In the first case the term is a genuine term, implied though not expressed; in the second it is a fiction, something added to the contract by the law.

It is believed that there is no case in which it has been necessary for a Court to make one or other of these views the basis of its decision, nor is it easy to think of circumstances in which the legal consequences of performance having become impossible would differ according to the view that the Court might adopt in this matter. Consequently we have to depend for the elucidation of the true basis of the doctrine on dicta, and we have always to be careful not to read into the dicta of judges, however carefully the language may have been chosen, opinions on a question which may not have been argued before them and may not even have been actually present to their minds. There are, however, some decisions in which judges have definitely taken the view that the implied term in these cases is a legal fiction. In one of these, *Russkoe v. Stirk*,^{(1922) 10 Lloyd's L.R. 214} Atkin, L. J., after saying that when the contract is terminated, the consequences that follow follow as a matter of positive law and not from any express or implied agreement of the parties, and that it was unfortunate that the

doctrine should ever have been based on the theory of an implied contract, went on to say:

'There are many positive rules of law imposed upon contracting parties which govern the whole creation, performance, and dissolution of a contract, which are quite independent of the intention of the parties. For my part I see no reason why, in a certain set of circumstances which the Court finds must have been contemplated by both parties as being of the essence of the contract and the continuance of which must have been deemed to have been essential to the performance of the contract, the Court should not say that when that set of circumstances ceases to exist, then the contract ceases to operate.'

[1939], 1
K.B. 132

Denny, Mott
& Dickson
v. Fraser,
[1944] A.C.
at p. 275

In *Tatem v. Gamboa*, Goddard, J., took a similar view; and Lord Wright, expressing what he describes as a 'somewhat heretical' view, has said that he thinks that the Courts have formulated the rule that they apply in these cases by virtue of their inherent jurisdiction, just as they have developed the rules of liability for negligence, or for the restitution of money where otherwise there would be unjust enrichment; they have invented it 'in order to supplement the defects of the actual contract'.

Hirji Mulji
v. Cheong
Yue S S
Co., [1926]
A.C. at p
510

Now it is true that there is a certain artificiality in the doctrine of the implied term as Lord Loreburn explained it; as Lord Sumner said of it in a later case, it is 'a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands'. But this element of artificiality is often present in the process which we euphemistically call 'interpretation'. Courts constantly have to ascribe an intention to the parties who have made a contract, or to the legislature which has enacted a statute, in respect of matters which were not foreseen, and therefore not provided for. In such cases the intention which the Court finds cannot be an actual one; it can only be what Lord Sumner in *Bank Line v. Capel* called a 'presumed common intention'. But that does not mean that the Court applies a rule of law which is independent of the intention of the parties. The question, as Lord Wright put it in *Constantine S.S. Line v. Imperial Smelting Corporation*, is always one of the construction of the particular contract,

[1919] A.C.
at p. 455

[1942] A.C.
at p. 185

whether the obligation is absolute or whether it is qualified, and 'in ascertaining the meaning of the contract, and its application to the actual occurrence, the Court has to decide, not what the parties actually intended, but what as reasonable men they should have intended. The Court personifies for this purpose the reasonable man.'

We may group under certain heads the cases in which the Courts have been ready to infer, from the nature of the contract or from the surrounding circumstances, that a promise, in terms absolute, is subject to an implied condition.

(1) The simplest case of the application of the doctrine of the implied term is probably that where the performance of a contract is made impossible by the destruction of a specific thing essential to that performance.

(1) Destruction of the subject-matter

'The principle', said Blackburn, J., in *Taylor v. Caldwell*, 'seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.'

3 B & S at p 839

In *Taylor v. Caldwell*, the defendant had agreed to give the plaintiff the use of a music-hall for the purpose of a concert. Before the day of performance arrived, the music-hall was destroyed by fire, and Taylor sued Caldwell for damages for breach of the contract which Caldwell, through no fault of his own, was no longer able to perform. It was held that 'the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor'.

The same principle was applied in *Appleby v. Myers*.

L R 2 C.P. 651

The plaintiffs undertook to erect certain machinery upon the defendant's premises and keep it in repair for two years. While the work was in progress the premises were wholly destroyed by fire. It was held that there was no absolute promise by Myers that his premises should continue in a fit state for Appleby's work, that the fire was a misfortune equally affecting both parties, excusing both from further performance, but giving a cause of action to neither. The agreement providing that the work was to be paid for on completion, Appleby could not recover on a

Infra, p. 374

1 Q.B.D. 258

quantum meruit in respect of the work done.

In *Howell v. Coupland*, there was an agreement for the sale of 200 tons of potatoes to be grown on a particular field. Failure of the crop was held a good defence to the purchaser's claim for damages for non-delivery of 120 tons.

And it is not necessary that the destruction of the thing should be absolute: it is enough if it ceases so to exist as to be fit or available for the purpose contemplated by the contract. In *Nickoll v. Ashton*, a cargo sold by the defendants to the plaintiffs was to be shipped by a specified ship; without default on the defendants' part the ship was so damaged by stranding as to be unable to load within the time agreed, and the Court held that in these circumstances the contract must be treated as at an end.

[1901]

2 K.B. 126

(2) Non-existence or non-occurrence of a particular state of things

(2) The rule in *Taylor v. Caldwell* has been held not to be limited to contracts *de certo corpore*, where the existence or continued existence of some specific thing is involved. In the so-called 'Coronation cases', which arose out of the postponement of the coronation of King Edward VII owing to his sudden illness, it was extended to contracts the performance of which was held to have become impossible by the non-existence or non-occurrence of a particular state of things forming the basis on which the contract had been made.

[1903]

2 K.B. 740

In *Krell v. Henry*, the defendant agreed to hire the plaintiff's flat for June 26 and 27; the contract contained

no reference to the coronation processions, but they were to take place on those days and to pass by the flat. The rent had not become payable when the processions were abandoned and the Court of Appeal held that the plaintiff could not recover it. The Court regarded the subject-matter of the contract as 'rooms to view the procession', and the postponement had made them not 'rooms to view the procession'.

'I do not think', said Vaughan Williams, L. J., 'that the principle . . . is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but if required from necessary inferences drawn from surrounding circumstances, recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things.'

at p. 749

The Coronation cases were decided on a principle which is doubtless a legitimate extension of the rule in *Taylor v. Caldwell*, but it has sometimes been doubted whether it was properly applied to the facts of those cases; for 'it may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract'. In *Herne Bay S.S. Co. v. Hutton*, also one of the Coronation cases, the Court pointed out that if the existence of a particular state of things is merely the *motive or inducement* to one party to enter into the contract, as distinct from the basis on which *both* contract, the rule has no application. The charter of a ship to see the coronation review and to cruise round the fleet was held to be a contract of this kind.

Lord
Funlay, in
Larrinaga
v. Société
Franco-
Americaine,
92 L. J. K. B.
at p. 459

[1903]
2 K. B. 683

It has been pointed out also that in none of the reported Coronation cases was the action brought against persons seeking to be excused on the ground of the impossibility of performing what they had undertaken; the actions were brought either for the price of seats which the persons

who had contracted for them refused to pay for, or to obtain a refund of money already paid for seats. It is suggested, therefore, that the issue which they raised was not so much one of impossibility of performance as of a failure of consideration for the promise to pay or for the price paid, and if the matter were *res integra*, this would be an attractive suggestion. It is, however, made difficult of acceptance by dicta in later cases of the highest authority which treat these cases as extending the rule in *Taylor v. Caldwell*.¹

(3) Incapacity for personal service

(3) Where performance of a contract for personal services is rendered impossible by the death or incapacitating illness of the promisor, a term will readily be implied that performance is conditional on the promisor's continued capacity to perform the contract; and in the passage already cited from the judgment of Blackburn, J., in *Taylor v. Caldwell* he treats the principle of that case as applicable equally to the perishing of persons or of things.

Supra, p. 343

L.R. 2
Exch. 311
314

In *Stubbs v. Holywell Ry. Co.* it was held that a contract for personal services was put an end to by the death of the party by whom the services were to be rendered. 'The man's life', said Martin, B., 'was an implied condition of the contract.'

L.R. 6
Exch. 269

In *Robinson v. Davison* an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who, having promised to perform at a concert, was prevented from doing so by dangerous illness. Judgment was given for the defendant on the ground that the continued good health of the defendant was a condition 'annexed to the agreement'. The contract being discharged, it was not broken by the defendant's failure to perform, nor, on the other hand, could she have insisted on performing when she was unfit to do so.

at p. 277

¹ e.g. *Horlock v. Beal*, [1916] 1 A.C. per Lord Shaw, at p. 513; *Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A.C. per Lord Porter, at p. 198.

(4) In commercial contracts the doctrine of the implied term is commonly spoken of as the doctrine of 'the frustration of the adventure'. Two lines of authority have converged in recent times, that of *Taylor v. Caldwell* and its later extensions, in which the issue is formulated as one of supervening events making the performance of a contract impossible, and that which derives from cases such as *Jackson v. Union Marine Insurance Co.*, where the question to which the Courts address themselves is whether supervening events have 'frustrated' the object of both parties by so changing the circumstances in which a promise falls to be performed that to hold the promisor to it would be to hold him to something which, though it may not be impossible, is something different from that which he originally promised to do. Most of the early 'frustration' cases arose out of delay, attributable to the fault of neither party, in the carrying out of charter-parties, and they seem at first to have been treated as raising a question which was regarded as connected, rather than identical, with that raised by the cases of 'impossibility'.

(4) Frustration of the adventure

L.R. 10
C.P. 148

In *Jackson v. Union Marine Insurance Co.* the plaintiffs' ship had been chartered to proceed to Newport and there load a cargo for San Francisco. On the way to Newport she ran aground, and after some weeks the charterers chartered another ship. The plaintiffs therefore claimed from the insurance company for a total loss by perils of the sea of the freight to be earned under the charter-party, and the question whether or not there had been such a loss depended for its answer upon the question whether or not the charterers had been justified in throwing up their contract instead of waiting until the ship was repaired and then loading her.

The jury found that the time necessary to get the ship off and repair her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the ship-owner and the charterers, and on this finding the Court held that a

voyage undertaken after the ship had been repaired would have been an adventure different from that which both parties had intended at the time of the contract. It was, they said, an implied term of the contract, that the ship should arrive at Newport in a reasonable time, and her not arriving at such a time put an end to it. 'The adventure', said Bramwell, B., 'was frustrated by perils of the seas, both parties were discharged, and a loading of the cargo in August would have been a new adventure, a new agreement.'

The dislocation of business caused by the first World War brought a large number of 'frustration' cases before the Courts, and it is now clear that they raise a question which is in effect the same as that raised by cases which have been classed under the head of 'impossibility'. 'When the question arises in regard to commercial contracts', says Lord Loreburn, 'the principle is the same and the language as to "frustration of the adventure" merely adapts it to the class of cases in hand.' 'The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made.' The modern tendency is to use the term 'frustration' to cover cases of both classes.

A shipowner engaged a seaman under articles which provided for a two years' engagement. While the articles were still running, the ship was seized by the German authorities in a Belgian port and the crew were interned for an indefinite period. The contract was held to be discharged, and the ship-owner to be no longer under any obligation to continue the payment of the seaman's wages.

Messrs. Dick, Kerr & Co. contracted with the Metropolitan Water Board to construct a reservoir within six years. During the course of construction the Minister of Munitions, acting under statutory powers, required them to cease work on their contract and remove their plant. No period of time was fixed during which the orders of the Minister were to remain effective, and the House of

Tamplin v.
Anglo-
Mexican Co.,
[1916]
2 A.C. at
p. 404

Constantine
S.S. Line v.
Imperial
Smelting
Corp., [1942]
A.C. per
Viscount
Maugham,
at p. 168

Horlock v.
Beal, [1916]
1 A.C. 486

Metrop.
Water
Board v.
Dick, Kerr
& Co., [1918]
A.C. 119

Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract, when resumed, in effect a different contract, and that the original contract was therefore discharged.

The judgment of Lord Sumner in *Bank Line v. Capel* [1919] A.C. 435 contains a valuable discussion of the principles which underlie the doctrine of frustration, and of the manner of its application to particular cases. The case was one in which the charterers of a ship sought to recover damages from its owners for failure to put the ship, which they had chartered for a period of twelve months, at their disposal. Before the ship could be handed over, she had been requisitioned, but a few months later, and within the period fixed for the charter, the Government released her, and the charterers thereupon called on the owners to deliver her. The owners pleaded successfully that the requisition had put an end to the charter by frustration.

Lord Sumner pointed out that in these cases of delay the question must be considered at the trial as it had to be considered by the parties at the time when they came to know of the cause and the probabilities of the delay, and had to decide what to do.

'Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their facts then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free.'

Lord Sumner went on to ask in what terms ought the circumstances to be defined which lead to the dissolution of the contract, and said that for himself he preferred to adopt a test which Lord Dunedin had used in the earlier case of *Metropolitan Water Board v. Dick, Kerr & Co.*, 'an interruption so long as to destroy the identity of the work

or service, when resumed, with the work or service when interrupted'. Lord Sumner also thought that the doctrine of frustration 'is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances'. Ultimately, however, it 'depends on the facts of each case'.

The close connexion between the doctrines of frustration and of mutual mistake should be noted. In both the law implies a condition, which the parties have not expressed, but which it assumes they would have inserted in the contract if the matter had occurred to them. In mistake the implied condition relates to existing, in frustration it relates to future, facts; but in both the question to be answered is, 'does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?'

Bell v.
Lever Bros.,
[1932] A.C.
per Lord
Atkin, at
p. 227

A difficult question which has not yet been finally decided by the Courts relates to the application of the doctrine of frustration to a lease. In *Cricklewood Property and Investment Trust v. Leighton's Investment Trust* lessees had a building lease for 99 years for the erection of shops. By reason of restrictions imposed under the Defence of the Realm Regulations they were unable to continue their building operations, and in an action by the lessors for the rent they pleaded that the lease had been frustrated, and that their liability for the rent had therefore ceased. As the lease had still more than 90 years to run, and as it was reasonable to assume that the interruption would cover only a small part of that period, the House of Lords had no hesitation in holding that on the facts of this case there had been no frustration.

(1943) 61
T.L.R. 202

But on the question whether a lease can in any circumstances be terminated by frustration the House was not agreed. Viscount Simon, L.C., and Lord Wright thought that, though the occasions on which the doctrine could apply to a lease must be very rare, yet it was possible to

imagine circumstances in which it might do so. The Lord Chancellor pointed out that a lease normally contains *express* agreed provisions which may bring about its premature determination, e.g. for non-payment of rent or breach of covenant, and he thought that there might be cases in which it would be right to *imply* a provision terminating it by frustration. Lord Wright put the case of a building lease for 99 years, and asked whether, if building were to be prohibited on the land under statutory authority for an indefinite period, the lessee would still be bound to pay the rent for the whole term. On the other hand, Lord Russell pointed out that a lease is more than a contract; it vests an estate in the land in the lessee, and the contractual obligations which it contains are merely incidental to the relation of landlord and tenant; he thought that even if they or some of them should become impossible, the lease would remain, and the estate in the land would still be vested in the tenant. Lord Goddard also thought that frustration cannot apply to a lease, and he pointed out that the case of a lessee prevented from building would be no harder than that of one who had bought a freehold and then been prevented from developing the land under some statutory provision. He also suggested that to hold that a lease had been frustrated might have some curious consequences; for example, the landlord might find himself entitled to resume possession of the land with some buildings already erected on it.

We may note here some of the limits which are implicit in the doctrine of frustration.

Firstly, it follows from the fact that it is based on the presumed intention of the parties that no term can be implied which would be inconsistent with any of the express terms of the contract. 'There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur.'

Secondly, the intention which is at the basis of the

Lord Parker
in *Tamplin*
S.S. Co. v.
Anglo-
Mexican Co.
[1916] 2 A.C.
at p. 422.

Viscount
Simon, L.C.,
in *Constantine*
S.S.
Line v. Imp.
Smelting
Corp. [1942]
A.C. at p. 163

[1918]
1 K.B. 540,
2 K.B. 467

doctrine is the *common* intention of the parties. In *Blackburn Bobbin Co. v. Allen*, the vendor, in a contract for the sale and delivery at Hull of Finnish birch timber, had found it impossible to fulfil his contract because the outbreak of war had cut off the source of supply of which he had intended to avail himself. Doubtless neither party had contemplated the occurrence of war, but they had not made the continuance of peace a condition of the contract. The buyer was unaware that timber from Finland was normally shipped direct from a Finnish port to Hull, and that timber merchants did not in practice hold stocks of it in this country. What had happened was merely that an unforeseen event had occurred which rendered it practically impossible for the vendor to deliver, but that event might have been, but was not, provided for in the contract. For the contract to be dissolved there must have been a failure of something which was at the basis of the contract in the intention of *both* parties, and that was not the case here.

Maritime
National
Fish Co. v.
Ocean
Trawlers,
[1935]
A.C. 524

[1942] A.C.
154

Thirdly, it is well established that the doctrine of frustration cannot apply where the event which is alleged to have frustrated the object of the contract arises from the act or election of a party. The rule, however, is not altogether clear if such an act was not intentional, but merely negligent. That question was discussed by the House of Lords in *Constantine S.S. Line v. Imperial Smelting Corporation*, and the dicta in that case make it probable that the rule may not be the same in all cases. Lord Russell, commenting on the phrase 'self-induced frustration', pointed out that the fault or default of a contractor might 'range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the *prima donna* who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the

meaning of the phrase.' It was not necessary for the House to decide the point, for it held that the burden of proving that the event which causes the frustration (in this case an explosion on a ship, the cause of which was unknown) is due to the act or default of a party, lies upon the party alleging it to be so, and it had not been discharged on the facts of the case before the House.

(5) The performance of a contract is sometimes made legally impossible either by a change in the law—the law may actually forbid the doing of some act undertaken in the contract, or it may take from the control of the promisor something in respect of which he has contracted to act or not to act in a certain way—or by a change in the operation of the law by reason of new facts, such as the outbreak of war, supervening. Such cases have often been treated as cases of frustration, but this, it will be submitted, is neither necessary nor desirable, for they are really based on a different principle.

Baily was lessee to De Crespigny, for a term of 89 years, of a plot of land: De Crespigny retained the adjoining land, and covenanted that neither he nor his assigns would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. Later a Railway Company, acting under parliamentary powers obtained after the making of the contract, took the paddock compulsorily, and built a station upon it. Baily sued De Crespigny upon the covenant: it was held that impossibility created by statute excused him from the observance of his covenant.

(5) Supervening illegality
Metropolitan Water Board v. Dick, Kerr, & Co., [1918] A.C. at p. 128

Baily v. De Crespigny, L.R., 4 Q.B. 180
Walton Harvey, Ltd. v. Walker, [1931] 1 Ch 274

'The Legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, *has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into.* To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.'

at p. 186

Brewster v.
Kitchell, 1
Ld. Raym.
at p. 321.
Reilly v.
The King,
[1934] A.C.
at p. 176.
De Béchée
v. S. Ameri-
can Stores,
[1935] A.C.
148

What the legislature had done in effect in this case was, to adopt a phrase used in a much older case, to 'repeal the covenant'. There is no need to imply a term in the original contract, for a sufficient explanation is 'the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged'.

The case of a contract which is to be performed abroad and which becomes impossible of performance because a change in the foreign law has made it illegal is somewhat similar. It has been held that in such a case the contract is discharged on the ground that

Ralli v
Compañía
Naviera
Sota y Av-
nar, [1920] 2
K.B. 287,
300, 304

'Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country.'

Kleinwort v.
Ungarische
Aktien-
gesellschaft,
[1939] 2
K.B. at
p. 698

But it would follow from that reasoning that if the parties had deliberately contracted to break the foreign law, and so made it impossible to imply the term, the result would have been different, and the contract would not then have been discharged. The true ground for the decision seems to be public policy, for 'this country', as Scrutton, L. J., said, 'should not assist or sanction the breach of the laws of other independent states'.

Supra, p. 218

Ertel
Bieher &
Co v Rio
Tinto Co.
[1918] A.C.
260

The outbreak of war is another event which, by changing the operation of the law, may have the effect of abrogating obligations outstanding under a contract by reason of supervening illegality, if one of the parties resides in this country and the other in enemy or enemy-occupied territory. In a recent case where the contract required the delivery of some machinery at Gdynia, a Polish port in German occupation, Viscount Simon gave two reasons, which he treated as distinct from one another, for holding that the contract could not be further performed; it had been frustrated by supervening events, not due to the default of either party, which had made the performance

Fibrosa
Spółka
Akcyjna v.
Fairbairn
Lawson
Combe
Barbour,
Ltd., [1943]
A.C. at
p. 40

indefinitely impossible, and in any case 'the contract could not be further performed because of supervening illegality'.

It remains to consider the position of the parties when the performance of a contract has been frustrated.

In the first place, the contract is not merely voidable at the option of one or other of the parties; it is brought to an end forthwith and automatically.

'Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration on the other hand is explained in theory as a condition or term of the contract implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract.'

Lord
Sumner in
Hirji Mulji
v. Cheong
Yue S.S. Co.,
[1926] A.C.
at p. 509

Some of the consequences, however, to which this rule of the automatic nature of the effects of frustration may lead are rather curious. For example, although on the facts of *Krell v. Henry* it is no doubt unlikely that the hirer of the rooms would have wanted to occupy them despite the cancellation of the procession, apparently he could not have insisted on doing so if for some reason he had wanted to. It has been pointed out, too, that the rule may cause precisely the inconvenience which it is intended to prevent, namely, uncertainty as to the future obligations of the parties; for though frustration operates automatically, yet until one of the parties has raised the question it cannot be known whether the facts have produced a case for its operation, and there seems to be nothing to prevent a party, who may not at first be quite sure whether or not

[1903] 2
K B 740

Supra, p. 344

Cf. McElroy
& Williams,
Impossi-
bility of
Perform-
ance, p. 227

it will be to his interest to treat the contract as frustrated, from waiting to see where his interest lies, and then claiming, if it suits him, that the contract has ceased to exist some time ago. If the effect of frustration were not thus automatic, and if it merely gave a right to rescind the contract, the right might be lost by delay in exercising it.

[1904] 1
K.B. 493

[1943] A.C.
32

Infra, p. 431

Secondly, the Courts have had to consider the effects of frustration not only on obligations falling due for performance after the happening of the event which frustrates the contract, but on money already paid or rights accrued under it before that event. This question arose in some of the Coronation cases, and the Courts then took the line that it was not possible to work out satisfactorily what the rights of the parties ought to be, and that any loss therefore must be left to lie where it had fallen. Thus in *Chandler v. Webster*, where the rent of the rooms was payable in advance, and the plaintiff had paid £100 on account, it was held that not only could he not recover what he had paid, but that he must pay the balance due. However, in *Fibrosa Spółka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* the House of Lords overruled these decisions. It was pointed out that an action for the recovery of the sum paid was not an action on the contract, which *ex hypothesi* had ceased to exist, but an action outside the contract to recover money paid on a consideration which had failed; it was an action in quasi-contract which the law gives because the party paying the money has not got what he bargained for.

But the law as this decision left it was still not satisfactory, for the party who had to return the prepayment might have incurred expenses, or he might be left with goods on his hands which were made valueless by the failure of the contract. The Law Reform (Frustrated Contracts) Act, 1943, was therefore passed to deal with the matter. The Act provides that where a contract governed by English law has become impossible of performance or

been otherwise frustrated,¹ and the parties thereto have for that reason been discharged from its further performance, all sums paid or payable to any party in pursuance of the contract before the time of discharge shall (if paid) be recoverable as money had and received by him for the use of the party by whom the sums were paid, or (if payable) cease to be so payable. But it goes on to provide that if a party to whom the sums were paid or payable has incurred expenses before the time of discharge in or for the purpose of the performance of the contract, the Court may, if it considers it just, allow him to retain, or to recover, as the case may be, the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses incurred. It also provides that where a party, by reason of anything done by any other party in or for the purpose of the performance of the contract, has obtained a valuable benefit, other than money, before the time of discharge, that other party may recover such sum, not exceeding the value of the benefit, as the Court considers just. The Act does not apply if there is an agreement to the contrary in the contract; and it does not make recoverable freight paid in advance under a voyage charter-party, as to which there exists a well-established custom, which has become part of the business practice of ship-owners and insurers, that it is not to be recoverable even though the completion of the voyage is frustrated.

Infra, p. 430

See
Appendix
A

¹ It is probable that this term was intended to cover the case of performance of a contract having become impossible owing to supervening illegality. (*v.s.* p. 353.)

CHAPTER XVI

Discharge of Contract by Operation of Law

THERE are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract, and these we will briefly consider.

Merger

Merger

Twopenny
v Young,
3 B. & C 208

If a higher security be accepted in the place of a lower, the security which in the eye of the law is inferior in operative power, in the absence of a contrary intention manifested by the parties, merges and is extinguished in the higher.

We have already seen an instance of this in the case of judgment recovered which extinguishes by *merger* the right of action arising from breach of contract.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.

The rules governing this process may be thus summarized:

Higgen's
case, 6 Co.
Rep 44 b

(a) The two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security taken in addition to one similar in character will not affect its validity, unless there be discharge by substituted agreement.

Holmes v.
Bell,
3 M. & G.
213

(b) The subject-matter of the two securities must be identical.

(c) The parties must be the same.

The rights and liabilities under a contract are also extinguished if they become vested by assignment or otherwise in the same person, for a man cannot contract with himself.

Capital and
Counties'
Bank v.
Rhodes,
[1903] 1 Ch.
631

Where a term of years becomes vested in the immediate reversioner, it merges in the reversion and all covenants attached to it are extinguished, though by a rule of Equity, which since the Judicature Acts applies in all Courts, the intention of the parties may operate to prevent the occur-

rence of a merger. Similarly, a bill of exchange is discharged, if the acceptor should eventually become the holder of it.

Bills of
Exchange
Act, 1882
s. 61

Alteration or Loss of a Written Instrument

If a deed or contract in writing be altered by addition or erasure, it is discharged, except as against a party making or assenting to the alteration, subject to the following rules:

Rules as
to altera-
tion

(a) The alteration must be made by a party to the contract, or by one holding the document on behalf of a party to the contract and for his benefit.

Pattinson v.
Luckley,
L.R. 10 Ex.
339

Alteration by accident or mistake occurring under such circumstances as to negative the idea of intention will not invalidate the document.

Hong Kong
& Shanghai
Bank v
Lo Lee Shi,
[1928] A.C.
181

(b) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(c) The alteration must be made in a material part. What amounts to a material alteration must needs depend upon the character of the instrument, and it is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. In a Bank of England note an alteration in the number of the note is not an alteration of the contractual terms which the document contains; but the fact that a Bank note is a part of the currency, and that the number placed on it is put to important uses by the Bank and by the public for the detection of forgery and theft, causes an alteration in the number to be regarded as material and to invalidate the note.

Material-
ity
Suffell v
Bank of
England,
9 Q.B.D. 555

An alteration, therefore, to effect a discharge of the contract, need not be an alteration of the *contract*, but must be 'an alteration of the instrument in a material way'. The Bills of Exchange Act, 1882, s. 64, after enacting that where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers,

provides that a bill shall not be avoided as against a holder in due course, though it has been materially altered, 'if the alteration is not apparent', and the holder may enforce payment of it according to its original tenor.

Loss

Bills of
Exchange
Act, 1882,
s. 69

The loss of a written instrument only affects the rights of the parties in so far as it may occasion a difficulty of proof. In the case of bills of exchange and promissory notes, if the holder of the instrument lose it, he may require the drawer to give him another bill upon his giving an indemnity against possible claims.

Bankruptcy

Bank-
ruptcy

Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the Court an order of discharge. It is sufficient to call attention to this mode of discharge, without entering into a discussion of the nature and effects of Bankruptcy, or the provisions of the Bankruptcy Act, 1914, which consolidates earlier enactments upon the subject.

When a man becomes bankrupt his property passes to his trustee, who can, as far as rights *ex contractu* are concerned (and we are not concerned with anything else), exercise the rights of the bankrupt, and can also do what the bankrupt could not do, since he can repudiate contracts if they appear to be unprofitable.

s. 28
Heather v.
Webb,
2 C.P.D. 1

When the bankrupt obtains an order of discharge he is discharged from all debts provable under the bankruptcy, with certain exceptions, whether or no they were proved, and even if the creditor was in ignorance of the bankruptcy proceedings. But the bankrupt's discharge may also be granted subject to conditions. The Court may require that he shall consent to judgment being entered against him for debts unsatisfied at the date of the discharge: and execution may be issued on such judgment with leave of the Court.

s. 26 (2)

s. 28 (1)

In no case is the bankrupt discharged from liability incurred by fraud or fraudulent breach of trust committed by him.

PART V

REMEDIES FOR BREACH OF CONTRACT

CHAPTER XVII

Remedies for Breach of Contract

WE have already endeavoured to state the rules which govern the *discharge* of contract by breach, and it now remains to consider the various remedies which are open to the person injured by the breach, whether the breach is of such a kind as to justify him in treating the contract as discharged or not.

Remedies
for
breach

These remedies fall under three heads:

(1) Every breach of contract entitles the injured party to damages for the loss he has suffered.

(2) If the injured party, when the breach occurs, has already done part, though not all, of what he was bound to do under the contract, he may be entitled to claim the value of what he has done. In that case he is said to sue upon a *quantum meruit*.

(3) In certain circumstances the injured party may obtain a decree for the *specific performance* of the contract, or an *injunction* to restrain its breach.

§ 1. *Damages*

When a contract is broken and action is brought upon it, how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

(1) The foundation of the modern law of damages is to be found in the judgment of the Court of Exchequer in *Hadley v. Baxendale*.

‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the

Per
Alderson,
B., 9 Exch.
at p. 354

contemplation of the parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.'

In the case in which these principles were laid down the plaintiffs' mill was stopped by the breakage of a crank-shaft, and it was necessary to send the broken shaft to the makers as a pattern for a new one. The defendants, who were carriers, were informed that the mill was stopped, and that the shaft must be sent immediately; but by some neglect on their part the delivery of the shaft to the makers was delayed, and in consequence of this the plaintiffs did not receive the new shaft until some days after they would otherwise have done; the restarting of the mill was thereby delayed and the plaintiffs lost profits which they would otherwise have made. The question was whether this loss of profits ought to be taken into account in estimating the damages.

Applying the principles quoted above the Court pointed out that the circumstances communicated to the defendants did not show that a delay in the delivery of the shaft would entail loss of profits of the mill; the plaintiffs might have had another shaft, or there might have been some other defect in the machinery to cause the stoppage.

'The loss of profits here', said the Court, 'cannot reasonably be considered such a consequence of the breach as could have been fairly and reasonably contemplated by both parties when they made this contract. For such loss would neither have flowed naturally from the breach in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated or known to the defendants.'

Later cases show that where there are special circumstances affecting a contract the mere communication to

a party of such circumstances is not enough to make that party liable, in the event of a breach, for damages beyond those which would be incurred in a similar contract not affected by such special circumstances; there must in addition be something to show that the contract was made *on the terms that* the defendant was to be liable for such special damages.

Exceptional loss should be matter of special terms

In *Horne v. Midland Railway Company*, the plaintiff being under contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendants to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, and were consequently rejected by the intending purchasers. The plaintiff sought to recover, in addition to the ordinary loss for delay, the difference between the price at which the shoes were actually sold and the high price at which they would have been sold if they had been punctually carried. It was held that this damage was not recoverable, unless it could be proved that the Company were informed of, and undertook to be liable for, the exceptional loss which the plaintiff might suffer from an unpunctual delivery.

L R 8 C P. 131

Again, in *British Columbia Sawmills v. Nettleship*, the plaintiffs delivered to the defendant to be shipped on the defendant's vessel certain cases of machinery intended for the erection of a sawmill at Vancouver. The defendant failed to deliver one of the cases, but was unaware of the fact that it contained a material part of the machinery without which the sawmill could not be erected at all. The plaintiffs claimed as damages not only the cost of replacing the lost parts, but also the loss incurred by the stoppage of their works during the time that the rest of the machinery remained useless owing to the absence of the lost parts. It was held that the measure of damages was the cost of replacing the lost machinery at Vancouver only, and the Court said:

Bostock v. Nicholson, [1902] 1 K B 725

L R 3 C P. 499, 505

'The defendant is a carrier and not a manufacturer of goods

supplied for a particular purpose. . . . He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could be foreseen and reasonably expected, and to which he assented expressly or impliedly by entering into the contract.'

The rule in *Hadley v. Baxendale* has been discussed and explained in scores of decisions, and its authority has repeatedly been recognized by the House of Lords. It is strange, therefore, that an important question as to its scope should still be undetermined.

It will be observed that the rule lays down that damages are recoverable in two cases:

(1) when they arise 'naturally, i.e. according to the usual course of things' from the breach;

(2) when they are 'such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach'.

Now if we were construing an Act of Parliament, it would be natural to assume that these two branches of the rule were intended to be independent of one another and not merely alternative ways of expressing the same thing. But in *Hadley v. Baxendale* the Court was explicitly concerned to formulate the direction which, in their opinion, a judge ought in future to give to a jury on questions of damages, and a careful reading of the judgment as a whole suggests that in the second branch of the rule the Court intended merely to express in other words for the sake of greater clearness what they had already said in the first branch. If that is so, the damages which can fairly and reasonably be considered as arising 'naturally, i.e. according to the usual course of things' from a breach of contract, are in fact those damages which 'may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it'.

There is, however, some authority for the view that,

whatever may have been the meaning that the Court in *Hadley v. Baxendale* intended to express, the law does recognize two different heads under which damages for breach of contract can be recovered, namely, (a) if they are such as the parties must be deemed to have contemplated as probable, and (b) if, whether the parties could have foreseen them or not, they arise 'naturally', in the sense of 'directly', without any break in the chain of causation, from the breach.

In the law of torts it seems to be settled that once it has been determined that an act is tortious the fact that the damage flowing from the act is not the exact kind of damage that might have been expected is immaterial; the defendant will be liable for *all* damage which is *directly* traceable to his tortious act.

It is believed that the case which laid down this principle was not intended to lay down the principle upon which damages are recoverable for breach of contract, though there has been some discussion on this point; and that it is not necessary that the rules of contract and of tort in this matter should be the same, though it has sometimes been said by judges that they are. A different rule as to the measure of damages may be justified by the fact that in tort the legal relation between the parties is constituted by the wrongful act of one party and is imposed upon the other against his will, whereas in contract the relation is assumed voluntarily on both sides and both have an opportunity of estimating the damage likely to be caused by a breach. Indeed, they sometimes do this expressly by naming a sum as liquidated damages. But the language of Lord Sumner in *Weld-Blundell v. Stephens* supports the view that even in contract damages can be recovered if they flow directly from the breach, that is to say, without any break in the chain of causation, whether or not they could have been contemplated by the parties at the time the contract was made. It is believed that the balance of authority is against this view.

In re
Polemis,
[1921]
3 K.B. 560

The Edison,
[1933] A.C.
at p. 461

The Notting
Hill, P.D.
per Lord
Escher, at
p. 113

[1920] A.C.
at p. 983
Vaile v.
Hobson,
149 L.T. 283

Damages
under the
Sale of
Goods
Act

ss. 50, 51

Brown v.
Muller, L.R.
7 Ex. 319

Barrow v.
Arnaud,
(1846)
8 Q.B. at
p. 609

Williams v.
Agus, [1914]
A.C. 510

The Sale of Goods Act, 1893, contains statutory provisions for the assessment of damages for breach of a contract of sale which are founded on *Hadley v. Baxendale*. The measure of damages for non-acceptance or for non-delivery is declared to be the 'estimated loss directly and naturally resulting, in the ordinary course of events, from the breach'; and where there is an available market for the goods in question this is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or delivered, as the case may be, or if no time was fixed, then at the time of the refusal to accept or deliver.

The reason underlying the latter part of the rule was thus expressed by Tindal, C. J.:

'When a contract to deliver goods is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them.'

The rule that the difference between the contract price and the market price is the measure of damages in such a case applies even where the purchaser, having arranged to resell at less than the market price, would not in fact have realized that difference if the vendor had carried out his contract; for after the breach the purchaser would have been compelled to buy at the market price in order to put himself into the same position as if the contract had been fulfilled.

If there is no market price for the goods at the time the contract is broken, either because the goods the subject of the contract were to be made to a special order or for some other cause, it is necessary to have recourse to the more general rule laid down by the Act; and the value of the goods, excluding circumstances peculiar to the plain-

tiff, must be estimated in the light of such other evidence as is available. Where the goods have been resold the resale price may be accepted as the best evidence of their value. But where the facts of the case show that such evidence would be untrustworthy some other means of assessment will be adopted.

France v.
Gaudet, L. R.
6 Q. B. 199

The Arpad,
[1934] P. 189

Similarly, when there has been a breach of warranty by the seller the measure of damages is again 'the estimated loss directly and naturally resulting in the ordinary course of events from the breach', and the case of *Hammond v. Bussey*, although decided before the Act itself was passed, illustrates the way in which the Court applies the principle in such a case.

s. 53 (2)

20 Q. B. D. 79

The action was for breach of warranty on a contract to supply coal, and the plaintiffs' claim was for the amount of damages which they had had to pay to persons to whom they had resold the coal with a similar warranty, and for the costs which they had incurred in defending the action brought against themselves. The defendant denied his liability for these costs.

The circumstances showed that the defendant knew that the plaintiffs, who were shipping agents, had bought the coal in order to resell it to the owners of steamers. He must have contemplated that claims for damages would be made against the plaintiffs by their sub-vendees if his warranty was broken, and that they would thereby be placed in the position of having to decide whether or not to defend an action. In fact, when this position arose the plaintiffs consulted him as to their course and he then insisted that the coal had been up to contract. With such an assurance it was reasonable that the plaintiffs should defend the previous action, and if the defence of the action was reasonable, there was no principle on which a distinction could be made between the damages and the costs which the plaintiffs had had to pay. The Court did not, of course, intend to lay down that in every contract of sale, where there is a sub-sale, the costs of defending an

action against a sub-vendee are recoverable. The costs were recoverable in this case because it must be supposed to have been in the contemplation of the parties that if the plaintiffs failed in an action which it was reasonable in the circumstances for them to defend they would have to pay both damages and costs.

Damages
for breach
of con-
tract not
vindictive

Finlay v.
Chirney,
20 Q.B.D.
at p. 498

Law Reform
Act, 1934,
s. 1 (2) (b)

(2) Damages for breach of contract are given by way of compensation for loss suffered and not by way of punishment for wrong inflicted. Hence the 'vindictive' or 'exemplary' damages of the law of tort have no place in the law of contract. To this rule, however, the action for breach of promise of marriage is an exception; in that case injury to the feelings may be taken into account in the assessment of the damages, except when the injured party is deceased and the action is brought for the benefit of the estate.

Moreover, the measure of damages is not affected by the motive or the manner of the breach. Thus in an action by a servant, who had been wrongfully dismissed in a harsh and humiliating manner, it was held that the damages could not include 'compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain employment'. The rule is well settled, but it is not easy, either on grounds of fairness or of general principle, to justify the exclusion at least of the latter of these heads of damage.

On the other hand, a distinction must be made between a breach of contract which causes injury to a reputation which a person already possesses and one which deprives him of an opportunity, to which the contract entitles him, of enhancing that reputation. So an actor, whose contract entitles him to be advertised as playing a leading part at a well-known music-hall, may recover damages, if he is wrongfully prevented from appearing, for the loss of publicity, though not for any injury that his failure to appear

Addis v.
Gramo-
phone Co.,
[1909] A.C.
488
Groom v.
Crocker,
[1938] 2
All E.R.
394

Clayton v.
Oliver,
[1930] A.C.
209
Withers v.
General
Theatre
Corp., [1933]
2 K.B. 536

may cause to his existing reputation. But the distinction may not be easy for a jury to apply.

(3) It follows also from the rule that damages are compensatory and not penal that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused or likely to be caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

Duty to
mitigate
damage
suffered

Thus, though the measure of damages for breach of a contract to deliver goods is ordinarily the difference between the contract price of the goods and the market price at the time when delivery should have been given, yet if the plaintiff might have mitigated his loss, as, for example, by an immediate purchase at a low price of goods to replace those not delivered, or by accepting a reasonable offer from the defendant to make good part of the loss, this is to be taken into account in assessing his damages. It is a question of fact in each case, and not of law, whether he has acted as a reasonable man might have been expected to act.

Brace v.
Calder,
[1895]
2 Q B. 253
P. yzu v
Saunders,
[1919]
2 K B. 581

For the same reason, namely, that damages are compensatory, if a contract has been broken but the injured party has suffered no loss by the breach, he is entitled to judgment in his favour, but for 'nominal' damages only.

(4) The parties to a contract not infrequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. By so doing, however, they do not exclude the application of the rule that damages for a breach are to be compensatory and not penal, and it is a question of the proper construction of the contract to decide whether a sum fixed in this way, however the

Assess-
ment by
parties

Penalty
or liqui-
dated
damages

parties may have described it, is a 'penalty', in which case it cannot be recovered, or a genuine attempt to 'liquidate', that is to say, to reduce to certainty, prospective damages of an uncertain amount, in which case the sum will be recoverable.

Dunlop v.
New Garage
Co., [1915]
A.C. 79

If the sum so specified is a 'genuine pre-estimate' of the damage which, judged of as at the time of the making of the contract, seems likely to be caused if the breach provided for should occur; or again, if, though not an estimate of the probable damage, the parties have fixed it because they were agreed in limiting the damages recoverable to an amount less than that which a breach would probably cause, the Court will accept the sum fixed by the parties. If, on the other hand, the sum was fixed *in terrorem*, that is to say, in order to prevent or penalize a breach, the Court will not accept it, and the damages actually incurred must be assessed in the usual way. In construing the terms 'penalty' and 'liquidated damages' the Court will not be bound by the phraseology of the parties; they may call the sum specified 'liquidated damages', but if the Court finds it to be a penalty, it will be treated as such.

Cellulose
Acetate Silk
Co. v.
Widnes
Foundry,
Ltd., [1933]
A.C. 20

We find a good illustration of the rule in the clause commonly inserted in charter-parties: 'Penalty for non-performance of this agreement, estimated amount of freight.' This clause is a penalty clause since its terms would make the same amount payable on *any* breach of the agreement, however small. Hence only the actual damage suffered can be recovered, irrespective of the amount of freight; and the clause has been described as a *brutum fulmen*. Even in a case where the clause appeared in the form: 'Penalty for non-performance of this agreement, proved damages not exceeding estimated amount of freight', it was held by the House of Lords, that, although if the clause had appeared for the first time, it might have been construed as merely imposing a limitation on the damages to be recovered, its character as a penalty clause was so well established that

Godard v.
Gray, L.R.
6 Q.B. 139,
148

if the parties intended to change its meaning so radically they must make their intention clearer than they had in fact done. The clause being a penalty clause, the damage in fact suffered could be recovered, even though it actually exceeded the estimated amount of freight.

Watts v.
Mitsui,
[1917] A.C.
at p. 234,
per Finlay,
L.C.

But this decision seems to have turned on the history of this particular clause in charter-parties. It must not be taken as deciding that where the parties have clearly agreed to limit the damages which are to be recoverable in the event of a breach to an amount specified in the contract, such an agreement is a penalty. It is perfectly within the powers of the parties to make an agreement to that effect if they choose to do so. Thus where the plaintiffs had agreed to pay 'by way of penalty the sum of £20 per working week for every week we exceed 18 weeks' in the delivery of certain machinery, and it was clear from the circumstances that the parties must have known that the damage which would be incurred must greatly exceed this sum, it was held that the sum was not a penalty, but was merely the amount which the plaintiffs had agreed to pay by way of compensation for delay, and that the damages must be limited to this agreed amount.

Cellulose
Acetate Silk
Co. Ltd. v.
Widnes
Foundry,
Ltd., [1933]
A.C. 20, and
[1931] 2
K.B. at
p. 407

A bond is in form a promise to pay a penal sum, generally on the non-performance of a covenant or agreement contained or recited in the bond. It may, however, take the form of a promise to pay a sum in compensation for damages arising from an act or acts specified in the bond. In the case of bonds or other contracts containing provisions of this nature it has been laid down that 'the Court must look to all the circumstances of each contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was'; but the following rules may be stated.

Strickland
v. Williams,
[1890]
1 Q.B. 382
Pye v
British
Automobile
Syndicate,
[1906]
1 K.B. 425
Webster v.
Bosanquet,
[1912] A.C.
394

(i) If the contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, this sum may be recovered as liquidated damages. But the sum fixed must not be unreasonable or

Dunlop v
New Garage
Co., [1915]
A.C. 79

extravagant, having regard to all the circumstances of the case. If it is, it will be a penalty.

Astley v.
Weldon, 2
B. & P. 346

(ii) If the contract is for a matter of certain value, and on breach of it a sum is to be paid in excess of that value, this is a penalty and not liquidated damages.

Kemble v.
Farren,
6 Bing. 147

(iii) If the contract contains a number of terms, some of certain and some of uncertain value, or some of great and some of trifling value, and a fixed sum is to be paid for the breach of any of them, there is a presumption that this is a penalty.

Dunlop v.
New Garage
Co., [1915]
79, 87

An illustration of (i) is afforded by clauses in building contracts to pay a fixed sum weekly or *per diem* for delay; or, in the case of a tenant of a public-house, to pay to the landlord a fixed sum as penalty on conviction for a breach of the licensing laws.

Ward v.
Monaghan,
11 T L R.
529

An illustration of (ii) is a promise to pay a larger sum if a smaller is not paid by a fixed day. The rule is harsh, for a man might suffer serious loss by the non-receipt of an expected payment: yet he can only recover the smaller sum.

Protector
Loan Co.
v. Grice,
5 Q B D.
502
Wallis v.
Smith, 27
Ch D. at
p. 257

On the other hand, it is no penalty to provide that if a debt is to be paid by instalments the entire balance of unpaid instalments is to fall due on default of any one payment, or that a deposit of purchase money should be forfeited on breach of any one of several stipulations, some important, some trifling.

6 Bing. 141

An illustration of (iii) is offered by *Kemble v. Farren*. Farren agreed to act at Covent Garden Theatre for four consecutive seasons and to conform to all the regulations of the theatre; Kemble promised to pay him £3 6s. 8d. for every night during those seasons that the theatre should be open for performance, and to give him one benefit night in each season. For a breach of any term of this agreement by either party, the one in default promised to pay the other £1,000, and this sum was declared by the said parties to be 'liquidated and ascertained damages and not a penalty or penal sum or in the nature thereof'. Farren

broke the contract, the jury put the damages at £750, and the Court refused to allow the entire sum of £1,000 to be recovered:

'If, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms.'

But these rules are no more than *presumptions* as to the intention of the parties; they may be rebutted by evidence of a contrary intention, appearing from a consideration of the contract as a whole.

at p 148

Pye v. British Automobile Syndicate,
[1906]
1 K B. 425

(5) Difficulty in assessing damages does not disentitle a plaintiff from having an attempt made to assess them, unless they depend altogether upon remote and hypothetical possibilities.

Difficulty of assessment must be met by jury

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He entrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, the difficulty was no reason for not giving any damages at all.

See also *Simpson v. L. & N. W. Railway Co.*, 1 Q B D. 274
Sapwell v. Bass, [1910] 2 K B. 486

So, too, where a candidate in a beauty competition, who had successfully passed the earlier stages of the competition, was, in breach of contract, not allowed to compete in the later stages, she was awarded substantial damages for the loss of the chance of being successful of which she had been wrongfully deprived.

Chaplin v. Hicks, [1911] 2 K B. 786

Interest
on
damages

(6) Interest on the whole or any part of a debt or damages recovered may now, under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, if the Court thinks fit, be included in the sum for which judgment is given, at such rate as the Court thinks fit, for the whole or any part of the period between the date when the cause of action arose and the date of judgment. But the Act does not authorize the giving of interest upon interest, nor does it apply to a debt on which interest is payable as of right by virtue of an agreement or otherwise, nor to the damages recoverable for the dishonour of a bill of exchange, as to which the Bills of Exchange Act, 1882, s. 57, contains special provisions.

§ 2. *Quantum Meruit*

If our law were scientifically arranged it would probably regard the rules about *quantum meruit* claims which we are about to consider merely as rules for the assessment of damages in a special case. But these rules have come down to us from a time when there were certain procedural advantages in framing a claim in *quantum meruit* rather than as damages for breach of contract, and though these advantages have now disappeared, the distinction still remains. *Quantum meruit* is still a remedy which is alternative to, rather than a form of, damages.

The case for which it provides is where the party injured by a breach of contract has done, at the time when the breach occurs, part, but not all, of that which he is bound to do under the contract. Suppose, for example, that by the terms of a contract *A* is to do a certain piece of work for *B* for a lump sum, payable on its completion. It is clear that if, for whatever reason, *A* only does part of that work, he cannot, *under the contract*, demand any remuneration for it.¹ But suppose that the reason for *A* not com-

Catter v.
Powell, 6
T R. 320

¹ *Dakin v. Lee*, [1916] 1 K.B. 566 shows, however, that if the work has been substantially completed, the fact that it is in minor respects defective will not disentitle the plaintiff to recover the agreed remuneration, with a deduction, however, sufficient to put the work into the condition it ought to have been in according to the contract.

pleting the work and thus being able to claim the agreed remuneration for it is that *B* has thrown up the contract. Clearly in such a case, whatever the contract may say, if what *A* has done can be estimated at a money value, the law ought to give him a remedy, and so it does; it says that he may claim *quantum meruit*, the reasonable value of the work that he has done. 'If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received.'

Best, C.J.,
in *Mavor v.*
Pyne, 3
Bing. 288

Now it is clear that in saying this the law is proceeding on a principle of assessment which differs from that which it applies in assessing damages for breach of contract. For whereas the purpose of damages is to place the injured party, as nearly as may be, in the position he would have been in if the other party had not broken the contract, the purpose of *quantum meruit* is to restore him to the position he would have been in if the contract had not been made. In other words damages are *compensatory*, and *quantum meruit* is *restitutory*, and, as Lord Porter pointed out in *Heyman v. Darwins*, the sum which the injured party is entitled to recover may differ according as it is assessed on one or on the other of these two principles. Suppose, for example, that *A* has undertaken to serve *B* for a year for a salary of £1,000, payable at the end of the year, and that after six months *B* wrongfully dismisses him. If *B* asks for damages, he will receive £500, for that is the sum that he would have earned under the contract if *B* had not broken it. But if he asks for *quantum meruit*, he is asking to be paid the reasonable value of his services, and that may conceivably be a different amount. In a very simple case like this probably the sum would be the same on whichever principle it is fixed, for the jury would be likely to say that the terms of the contract make it reasonable to say that his services were worth £500. Still even in this case there might be some special circumstances which would

[1942] A.C.
at p. 307

show that the contract sum was not the real value of the services, and that would be even more likely in more complicated facts. Anyhow as the distinction between damages and *quantum meruit* still survives in the law we have to examine the nature of a *quantum meruit* claim, and the circumstances in which it may be brought.

The right to claim *quantum meruit* does not arise out of the contract as the right to damages does; it is a right conferred outside the contract by the law, a quasi-contractual right, therefore, and not a contractual one, and it would be more correct to describe it as an incident of, rather than as a remedy for, the breach of a contract. We shall see later that breach of contract is only one of several occasions which give rise to *quantum meruit* claims, and that such claims are sometimes quasi-contractual, as here, but that sometimes they are genuinely contractual.

Infra, p. 441

A *quantum meruit* claim is only available if the original contract has been discharged. That contract must have been broken by the defendant in such a way as to entitle the plaintiff, according to the principles discussed in Chapter XIV, to regard himself as discharged from any further performance, and he must have elected to do so. If the contract is still, as it is said, 'open', he cannot use the *quantum meruit* remedy, but must rely on his remedy in damages.

Alderson, B.,
in *De Bern-*
hardy v.
Harding,
8 Exch. 822

Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done.

8 Bing. 14

Planché v. Colburn provides a useful illustration. There the defendants had commenced a periodical publication, called 'The Juvenile Library', and had engaged the plaintiff to write a volume on ancient armour for it. When the plaintiff had completed part but not the whole of his volume, the defendants abandoned the publication, and the plaintiff was held entitled to retain a verdict for £50

which the jury had awarded him. The report does not make it quite clear whether this sum was damages for the breach, or the amount at which the Jury had assessed the work he had done, for he had made alternative claims; but the judgment of Tindal, C. J., calls attention to the limitation on the availability of *quantum meruit* which has just been mentioned. 'I agree', he said, 'that when a special contract is in existence and open the plaintiff cannot sue on a *quantum meruit*; part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned.'

§ 3. *Specific Performance and Injunction*

Under certain circumstances a promise to do a thing may be enforced by a decree for specific performance, and an express or implied promise to forbear by an injunction.

These remedies were once exclusively administered by the Chancery. They supplemented the remedy in damages offered by the Common Law, and were granted at the discretion of the Chancellor acting as the administrator of the King's grace.

Specific
perform-
ance a
matter of
grace

It will be enough here to illustrate the main characteristics of these remedies—that they are supplementary—that they are discretionary.

When
refused

(1) Where damages are an adequate remedy, specific performance will not be granted:

'The remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules.'

Ryan v.
Mutual
Tontine
Association,
[1893] 1 Ch.
at p. 126

Damages may be a very insufficient remedy for the breach of a contract to convey a plot of land: the choice of the intending purchaser may have been determined by considerations of profit, health, convenience, or neighbourhood: but damages can usually be adjusted so as to compensate for (let us say) a failure to supply goods. In the

Sale of
Goods Act,
1893, s. 52

Re Wait,
[1927]
1 Ch. 606

case of an agreement to sell goods the Chancery would decree the specific performance only in the case of chattels possessing a special beauty, rarity, or interest; but now by statute, in the case of a breach of contract to deliver *specific* or *ascertained* goods, the Court may direct the contract to be performed specifically without allowing the seller an option to retain the goods and pay damages.

(2) Where the Court cannot supervise the execution of the contract specific performance will not be granted.

Wolver-
hampton
Railway
Co. v L &
N.W. Rail-
way Co.,
L.R. 16 Eq.
439

If the Court endeavoured to enforce a contract of employment, or a contract for the supply of goods to be delivered by instalments, it is plain 'that a series of orders and a general superintendence would be required which could not conveniently be undertaken by any Court of Justice', and 'the Court acts only where it can perform the very thing in the terms specifically agreed upon'.

(3) Unless the contract is 'certain, fair, and just', specific performance will not be granted.

Webster v
Cecil, 30
Beav 62

Coles v.
Trecothick,
9 Ves. at
p. 246

Eads v.
Williams,
4 De G. M.
& G. at p
691

It is here that the discretionary character of the remedy is most strongly marked. It does not follow that specific performance will be granted although there may be a contract actionable at Common Law, and although damages may be no adequate compensation. The Court will consider the general fairness of the transaction and refuse the remedy if there is any suspicion of sharp practice on the part of the suitor. Inadequacy of the consideration, however, is not in itself a sufficient ground for refusing specific performance; unless it is 'such as shocks the conscience' and amounts in itself to evidence of fraud. The Court will not grant specific performance unless the party seeking it comes promptly, as soon as the nature of the case permits.

Kekewich
v Manning,
1 D.M. & G.
at p. 188

In re
Lucan, 45
Ch D. 470

Akin to this principle is the requirement that there must be *mutuality* between the parties. This means that at the time of making the contract there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific performance of a

gratuitous promise under seal will not be granted; nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself, and though he might bring action upon it for damages in the King's Bench Division of the High Court, 'it is a general principle of Courts of Equity to interfere only where the remedy is mutual'.

Fight v. Bolland, 4 Russ. 298

An injunction may be used as a means of enforcing a simple covenant or promise to forbear. Such would be the case of a building covenant restraining the use of property otherwise than in a certain specified manner.

Injunction

Or it may be the only means of enforcing the specific performance of a contract where damages would be an inadequate remedy, while to enforce performance of the contract would involve a general superintendence such as the Court could not undertake. Thus an hotel-keeper who obtained a lease of premises with a covenant that he would buy beer exclusively of the lessor and his assigns was compelled to carry out his covenant by an injunction restraining him from buying beer elsewhere; and in *The Metropolitan Electric Supply Co. v. Ginder* an express promise by the defendant to take the whole of his supply of electricity from the Company was held to import a negative promise that he would take none from elsewhere, and an injunction was accordingly granted.

Clegg v. Hinds, 44 Ch D. 503

[1901] 2 Ch. at p. 807

Contracts of personal service seem to be regarded by the Courts as distinguishable from other contracts in respect of this remedy. In *Lumley v. Wagner* Miss Wagner agreed to sing at Lumley's theatre, and during a certain period to sing nowhere else. Afterwards she made a contract with another person to sing at another theatre, and refused to perform her contract with Lumley. The Court refused to enforce Miss Wagner's positive engagement to sing at Lumley's theatre, but compelled performance of her promise not to sing elsewhere by an injunction.

when granted in contracts of personal service
1 D M. & G. 604

Here there was an express negative promise which the

Court could enforce, and it has been argued that an express *positive* promise implies a negative undertaking not to do anything which would interfere with the performance of this promise. But the Courts have refused in contracts of personal service to enforce by injunction anything but a stipulation not to do some specific thing, nor will they grant an injunction when its substantial effect would be to force the defendant specifically to perform his agreement, for they are disinclined to carry any further the principle of *Lumley v. Wagner*. It is said to be 'an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend'.

Mortimer
v Beckett,
[1920] 1 Ch.
571

A manager was employed by a company and agreed to 'give the whole of his time to the company's business': afterwards he gave some of his time to a rival company. In terms the agreement contained no negative covenant, and in the circumstances of the case the Court thought that an injunction would have been, in substance, a decree for specific performance of the agreement. It was therefore refused.

Whitwood
Chemical
Co v Hard-
man, [1891]
2 Ch 428

This principle will be acted upon although a stipulation, affirmative in substance, is couched in a negative form. An employer agreed with his manager that he would not require him to leave the employment except under certain circumstances. It was held that such an undertaking could not be enforced by an injunction to restrain the employer from dismissing the manager.

Davis v.
Foreman,
[1894] 3 Ch.
654

The scope of the principle of *Lumley v. Wagner* is indicated in the following cases.

Ehrman v.
Bartholomew,
[1898]
1 Ch. 671

A traveller promised that he would serve a firm for ten years and would not, during that period, 'engage or employ himself in any other business'. An injunction to restrain him from accepting other employment was refused, among other grounds, because to have granted it would have been to compel the defendant to abstain from any business whatsoever. But if the contract for a term of service is of a special character, as for instance that of

a confidential clerk in possession of trade secrets, an injunction will, if necessary, be granted to restrain him from accepting other employment in relation to goods of the kind dealt in by the plaintiffs.

Robinson
v. Heuer,
[1898] 2 Ch.
451

A film actress agreed to give her exclusive services for a certain period to the plaintiffs, and also during the term of the contract not to give her services to any other person. She repudiated the contract and secured another engagement on more favourable terms. In granting an injunction, which was limited in time and to this country, Branson, J., said:

Warner
Bros.
Pictures v.
Nelson,
[1937]
1 K.B. 209

'The conclusion to be drawn from the authorities is that where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case.'

§ 4. *Discharge of Right of Action arising from Breach of Contract*

The right of action arising from a breach of contract may only be discharged in one of three ways:

Discharge
of right of
action,

- (a) By the consent of the parties.
- (b) By the judgment of a court of competent jurisdiction.
- (c) By lapse of time.

(a) *Discharge by consent of the parties*

This may take place either by Release or by Accord and Satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without Consideration must, in order to be binding, be made under seal. A Release is a waiver, by the person entitled, of a right of action, accruing to him from a breach of a promise made to him.

by Re-
lease,

Such a waiver, then, should be under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.

To this rule bills of exchange and promissory notes form an exception. We have already seen that these instruments admit of a parol waiver before they fall due. One who has a right of action arising upon a bill or note can discharge it by an unconditional gratuitous renunciation, in writing, or by the delivery of the bill to the acceptor.

Bills of
Exchange
Act, 1882,
s. 62
by Accord
and Satis-
faction

Accord and Satisfaction is an agreement, not necessarily under seal, the effect of which is to discharge the right of action possessed by one of the parties to the agreement.

Ante, p. 102

The Accord is the agreement by which the obligation is discharged. The Satisfaction is the consideration which makes the agreement operative, and formerly it was necessary that this consideration should be executed. But in modern law not only the *performance* of a new promise, but a new promise of itself, that is to say, a promise of something different from that which the debtor was bound to perform by the original contract, will discharge the original cause of action, provided that it is clear that the intention was that the promise should be taken in satisfaction.

Morris v
Baron,
[1918] A.C. 1
per Lord
Atkinson
at p. 35
British
Russian
Gazette v.
Associated
Newspapers,
[1933]
2 K.B. at
p. 643

(b) *Discharge by the judgment of a Court of competent jurisdiction*

The judgment of a Court of competent jurisdiction in the plaintiff's favour discharges the right of action arising from breach of contract. The right is thereby *merged* in the more solemn form of obligation called a Contract of Record.

Supra, p. 60

The result of legal proceedings taken upon a broken contract may thus be summarized:

Effect of
bringing
action;

R.S.C.
Order 25.
r. 4

The bringing of an action has not of itself any effect in discharging the right to bring the action. Another action may be brought for the same cause in another Court; and though proceedings in such an action would be stayed, if they were merely vexatious, upon application to the

summary jurisdiction of the Courts, yet if action for the same cause be brought in an English and a foreign Court, the fact that the defendant is being sued in the latter would not, unless the English action is regarded as 'vexatious', in any way help or affect his position in the former. But when judgment is given in an action, whether by consent, or by decision of the Court, the obligation is discharged by *estoppel*. The plaintiff cannot bring another action for the same cause so long as the judgment stands. The judgment given may be reversed on appeal and entered in his favour, or the parties may be remitted to their original positions by a new trial of the case being ordered by the Court of Appeal.

McHenry v. Lewis,
22 Ch.D. 397

of judgment,

Ex parte
Bank of
England,
[1895] 1 Ch.
37

Conquer v. Boot, [1928]
2 K.B. 336
by way of
estoppel,

But such an estoppel can only result from an adverse judgment if it has proceeded upon the merits or substance of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time, as where action is brought before a condition of the contract is fulfilled, such as the expiration of a period of credit in the sale of goods, a judgment proceeding on these grounds will not prevent him from succeeding in a subsequent action.

Palmer v. Temple, 9
A. & E. 508

It remains to say that the obligation arising from judgment may be discharged if the judgment debt is paid, or satisfaction obtained by the creditor from the property of his debtor by the process of execution.

4 & 5 Anne,
c. 16 s. 12

(c) *Lapse of Time*

At Common Law lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

Per Lord
Selborne,
Llanelly
Railway Co.
v. L. & N.W.
Railway Co.,
L.R. 7 H.L.
567

But though the right possesses this permanent character, the remedies arising from its violation are withdrawn after a certain lapse of time; *interest reipublicae ut sit finis litium*. The remedies are barred, though the right is not extinguished.

Limitation
Act, 1939

The law on this subject of the limitation of actions was, until recently, in a very confused state; it had to be sought in a number of statutes and judicial decisions which had resulted in a welter of illogical distinctions. Happily the Limitation Act, 1939, has now greatly simplified the law.

s. 2

The Act provides that an action founded on a simple contract must be commenced within six years, and one on a specialty within twelve years, from the date on which the cause of action accrues.

Disabili-
ties sus-
pending
operation
of the
Act

s. 12

If, however, on that date the person to whom the right of action accrues is under a 'disability', the action may be brought within six (or twelve) years from the date when the person ceases to be under the disability, or dies. This enlargement of the time does not apply when the right of action first accrues to a person not under disability through whom the person under a disability claims. The disabilities mentioned in the Act are infancy, unsoundness of mind, and penal servitude.¹

s. 31 (2)

Effect of
fraud or
mistake

s. 26

When an action is based on the fraud of the defendant, or when the existence of the right of action has been concealed by his fraud, or when an action is for relief from the consequences of a mistake, the period does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.

Revival of
right of
action

Statutes of Limitation may be so framed as not merely to bar the remedy, but wholly to extinguish the right: this was the case before the Act in actions for the recovery of land, and since the Act the same rule applied to chattels. But in contract, the remedy alone is barred by the Act, and it may in certain circumstances be revived.

ss. 23 (4), 24

When any right of action has accrued to recover a debt or other liquidated pecuniary sum, and the person liable

¹ By the Limitation (Enemies and War Prisoners) Act, 1945, if before the expiration of the period for the bringing of an action a necessary party has been an enemy or detained in enemy territory, the period does not run while he was an enemy or so detained, and in no case expires before twelve months after he ceases to be an enemy or detained. See also McNair, *Legal Effects of War*, pp. 74-81.

acknowledges the claim or makes any payment in respect of it, the right is deemed to have accrued on the date of this acknowledgment or of the last such payment. An acknowledgment must be in writing and signed by the person making it or his agent, and either an acknowledgment or part payment must be made to the person or to the agent of the person whose claim is acknowledged or in respect of whose claim the payment is made.

The periods of limitation prescribed by the Act do not apply to claims for specific performance or an injunction or other equitable relief, except in so far as the court, applying the equitable doctrine of 'laches', may do so by analogy. The discretionary character of these remedies would be impaired by the automatic application to them of fixed periods, and in the doctrine of laches Courts of Equity have developed a doctrine which is more appropriate to them. This has been described in a well-known passage in the advice of the Privy Council in *Lindsay Petroleum Co. v. Hurd*, as follows:

Laches

L. R. 5 P.C.
at p. 239

'The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval.'

This passage was later discussed and approved in the speeches delivered in the House of Lords in *Erlanger v. New Sombrero Phosphate Co.* We have already seen an instance of its application in the case of *Allcard v. Skinner* mentioned in an earlier chapter.

3 App. Cas.
121836 Ch.D.
145
Supra, p. 203

PART VI

AGENCY

WHEN dealing with the Operation of Contract we had to note that although one man cannot by contract with another confer rights or impose liabilities upon a third, yet that one man may represent another, as being employed by him, for the purpose of bringing him into legal relations with a third. Employment for this purpose is called Agency.

Outline of
subject

The rules which govern the relation of Principal and Agent fall under three heads.

1. The mode in which the relation is formed.
2. The effects of the relation when formed ; and here we have to consider—
 - (a) The relations of principal and agent ;
 - (b) The relations of the parties where the agent contracts for a principal whom he names ;
 - (c) The relations of the parties where the agent contracts as agent, but without disclosing the principal's name ;
 - (d) The relations of the parties where the agent contracts in his own name, without disclosing his principal's existence.
3. The mode in which the relation is brought to an end.

CHAPTER XVIII

The Mode in which the Relation of Principal and Agent is created

FULL contractual capacity is not necessary to enable a person to represent another so as to bring him into legal relations with a third. An infant can be an agent, although he cannot incur liability on any contract of agency with his principal. But no one can enter into a contract through an agent, which is outside his own contractual capacity.

Capacity of parties

The authority given by the principal to the agent, enabling the latter to bind the former by acts done within the scope of that authority, may be given by writing, words, or conduct.

How the relation may arise

In one case only is it necessary that the authority should be given in a special form. In order that an agent may make a binding contract under seal it is necessary that he should receive authority under seal. Such a formal authority is called a *power of attorney*.

Formal grant of authority requisite for contract under seal

The conduct of the parties may create an inference that an authority has been conferred by one upon the other.

Conduct

In *Pickering v. Busk* the plaintiff allowed a broker to purchase for him a quantity of hemp, which by the plaintiff's desire was entered in the place of deposit in the broker's name. The broker sold the hemp and it was held that the conduct of the plaintiff gave him authority to do so.

15 East 38

'Strangers', said Lord Ellenborough, 'can only look to the act of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.'

at p. 43

We may, if we please, apply to such a case the term agency by *estoppel*, for estoppel means only that a man

is not permitted to resist an inference which a reasonable person would necessarily draw from his words or conduct.

Members
of Clubs

Fleming v
Hector,
2 M & W.
172.
Wise v.
Perpetual
Trustee Co.
[1903] A.C.
139

There may, on the other hand, be cases in which a man is the agent of another in the sense that he acts on his behalf, but the circumstances negative any intention that he should have authority to pledge the other's credit. Such is the case of the committee of a club who manage the affairs of the club on behalf of the whole body of members. The committee have no authority, as such, to pledge the personal credit of individual members, nor can they be said to be held out by individual members as having such authority.

The inference of intention to confer authority may be affected by the relation in which the parties stand to one another, and in this connexion the relation of husband and wife requires special consideration.

Husband
and wife

Debenham
v. Mellon,
per Thesiger,
L. J.
5 Q.B.D.
at p 403

Only in one special case—that of *agency of necessity*, which will be considered later—does marriage as such confer an inherent authority on a wife to act as her husband's agent. Apart from this she may receive his authority expressly, or she may receive it by implication from his conduct. If, for example, the husband has recognized, and taken on himself the liability in respect of, his wife's past dealings with a tradesman, he has by his own acts held her out as his agent and as having his authority, and he will be liable on such contracts as she may make with that tradesman, unless and until he brings to the actual knowledge of the tradesman the fact that her agency is determined. But in such cases as these the authority of a wife differs in no way from that of any other agent, for if, for example, a master allows his servant to purchase goods for him of *X* habitually, upon credit, *X* becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.

1 Shower,
95

It is indeed (apart from *agency of necessity*) not the legal tie of marriage, but the fact of cohabitation, that makes a wife's position in any way a special one, for cohabitation

(whether or not the parties are legally married) raises a presumption of fact that the wife has authority to contract for her husband 'in all domestic matters ordinarily entrusted to a wife, as the reasonable supply of goods and services for the use of the husband, his wife, children, and household, suitable in kind and sufficient in quantity, and necessary in fact, according to the condition in which they live'. This presumption, however, being one of fact only, may be rebutted by evidence which shows that in fact the authority does not exist. Thus the husband may rebut it by proving (1) that he expressly warned the tradesman not to supply goods on credit; (2) that the wife was already supplied with a sufficiency of the articles in question; (3) that the wife was supplied with a sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit; (4) that the husband expressly forbade his wife to pledge his credit; (5) that the order, though for necessaries, was excessive in point of extent, or (having regard to the amount of the husband's income) extravagant. It follows that one who deals with a married woman on credit, does so, so far as regards his remedy against the husband, at his own risk.

We may contrast this relation with that of partnership. Marriage does not of itself create the relation of agent and principal: partnership does. The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding liability for the act of his fellows.

In certain circumstances the law confers an authority on one person to act as agent for another without requiring the consent of the principal. Such agency is called *agency of necessity*.

A husband is bound to maintain his wife; and if he makes no adequate provision for her maintenance she is entitled to supply the needs of herself and her children

Morel Bros.
v. Lord
Westmor-
land, [1904]
A.C. 11
Miss Gray
Ltd. v
Earl Cath-
cart, 38
T.L.R. 562

different
rule for
partners

Partnership
Act, 1890,
s. 5
Hawken v.
Bourne,
8 M. & W.
710

Agency of
Necessity

Eastland v
Burchell,
3 Q.B.D.
at p. 436.

Wilson v.
Glossop,
20 Q.B.D.
354

upon his credit. Her authority in such a case seems to extend to 'necessaries', in the usual legal sense of goods and services suitable to the style of living maintained by the husband. Agency of necessity may exist either during cohabitation, or after separation, provided that the separation takes place through the husband's fault and that the wife has not been unchaste.

Wright v.
Annandale
[1930] 2
K.B. 8

In this case the relation of principal and agent is itself created, not by the parties, but by the law. But the term agency of necessity is also sometimes applied to cases where, after the parties have created the relation, the law, in view of some unforeseen emergency, allows the agent to exceed the authority which his principal has conferred on him. Thus a carrier of goods, or a master of a ship, may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. It has even been held that where goods are exported, unordered, or not in correspondence with samples, the consignee has, in the interest of the consignor, an authority to effect a sale.

Kemp v
Pryor, 7
Ves. 246

Apart from these cases the limits of the doctrine are not very clear. There is certainly in English law nothing which corresponds to the *negotiorum gestio* of Roman law. As long ago as 1776 it was held that the finder of perishable goods is not in such a position. In that case the defendant had found a pointer dog, and refused to give him up unless paid for the expense of his keep, but the defendant's counsel declined even to argue the case. 'The doctrine of authority by reason of necessity', it has been said, 'is confined to certain well-known exceptional cases, such as those of the master of a ship, or the acceptor of a bill of exchange for the honour of the drawer.'¹ It has indeed been

Binstead v
Buck,
2 W. Bl.
1117

Gwilliam v
Twist, [1895]
2 Q.B., per
Escher, M.R.,
at p. 87

¹ See Bills of Exchange Act, 1882, s. 65 et seq. Any person, not being a party already liable on a bill of exchange, may, with the holder's consent, intervene and accept a bill 'supra protest' for the honour of any party liable thereon, after it has been 'protested' for dishonour by non-acceptance. The acceptor for honour thereby makes himself liable to pay the bill, and succeeds to the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party.

suggested by McCardie, J., that the doctrine should be extended to all agents when an emergency arises necessitating immediate action on the agent's part beyond the limits of his mandate. This would only occur (1) when the agent is unable to communicate with his principal; (2) when he acts under a definite commercial necessity; and (3) when he acts bona fide in the interest of the principal. But it is not clear that the Courts are prepared to extend the doctrine as far as this.

Prager v.
Blatspiel,
[1924]
1 K.B. 566

Jebara v.
Ottoman
Bank, [1927]
2 K.B.
at p. 270

It remains to consider Ratification, or the adoption by *A* of the benefit and liabilities of a contract made by *X* on his behalf, but without his authority. This may occur either when *X*, though contracting as *A*'s agent, and having *A* in contemplation as his principal, was not at the time his agent in fact, or when *X* was in fact *A*'s agent at the time of making the contract, but exceeded the authority which *A* had given him. In either case a ratification duly made places the parties exactly in the position in which they would have been if *X* had had *A*'s authority at the time he made the contract. It is said to 'relate back'. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

Ratifica-
tion:

Koenigs-blatt
v. Sweet,
[1923] 2 Ch
at p. 325

'An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case the principal is bound by the act whether it be for his detriment or his advantage, and whether it be in tort or in contract.'

Wilson v.
Lumman, 6
M & G 242

There can be no true ratification where an agent purports to accept an offer 'subject to ratification' by his principal. In such a case the so-called ratification would be merely an acceptance of the offer of the other party, which may be withdrawn at any time before the so-called ratification takes place.

Watson v.
Davies,
[1931] 1 Ch.
455

So, too, a forged signature cannot be ratified, for one who forges the signature of another is not an agent, actually or in contemplation. The forger does not act for

Brook v.
Hook, L.R.
6 Ex 799.
Greenwood
v. Martin's
Bank, 47
T.L.R. 607

another; he personates the man whose signature he forges.

The rules which govern Ratification may be stated thus:

rules
which
govern it

The agent must contract as agent, for a principal who is in contemplation, and who must also be in existence at the time, for such things as the principal can and lawfully may do.

(a) The agent must purport to contract *as agent*.

Agency
must be
declared

A man may not incur a liability on his own account and then assign it to some one else under colour of ratification. We shall see that if an agent has a principal, and contracts in his own name without disclosing that principal's existence, he cannot divest himself of the liability to have the contract enforced against himself by the party with whom he deals; under such circumstances that party is entitled to the alternative liability of the agent or the principal. So if one who has no principal contracts in his own name, he can divest himself of his rights and liabilities in favour of another only by *assignment* to that other, subject to the rules laid down elsewhere in this book; and this is so even though the person contracting intends to contract on behalf of some third person, if he 'at the same time keeps his intention locked up in his own breast'.

Infra, p. 410

Keighley,
Maxsted
& Co v.
Durant,
[1901] A.C.
240

(b) The agent must act for a principal who is in contemplation.

for a con-
templated
principal
Wilson v.
Tumman,
6 M. & G.
242

He must not make a contract, as agent, with a vague expectation that parties of whom he is not cognizant at the time will relieve him of his liabilities. The act must be 'done *for another* by a person not assuming to act for himself but for such other person'.

Tiedemann
v. Leder-
mann, [1899]
2 Q.B. 66

So where an agent, without authority and fraudulently, entered into a contract for the sale of wheat in his principal's name, but intending to avail himself of it, for his own ends, the principal could nevertheless ratify and adopt the contract and hold the buyers to their bargain.

Where work is done on behalf of the estate of a deceased

person by order of one who afterwards becomes administrator and ratifies the contract for the work so done, such a ratification creates a binding promise to pay for the work. Here the principal contemplated is really the estate of the deceased person; this is in existence, although there may be no one capable of acting on its behalf until letters of administration have been obtained.

In re
Watson, 18
Q.B.D. 116

(c) The principal must be in existence.

This rule is important in its bearing on the liabilities of companies for contracts made by the promoters on their behalf before they are formed. In *Kelner v. Baxter* the promoters of a company as yet unformed entered into a contract on its behalf, and the company when duly incorporated ratified the contract. It became bankrupt, and the defendant who had contracted as its agent was sued upon the contract. It was argued that the liability had passed, by ratification, to the company and no longer attached to the defendant, but the Court held that this could not be.

who is in
existence

L.R. 2 C.P.
174

'Could the "company"', said Willes, J., 'become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law, as in the case of the assignees of bankrupts, or administrators whose title for the protection of the estate vests by relation.'

at p. 184

The rule was cited with approval and adopted by the Privy Council in the later case of the *Natal Land Co. v. Pauline Colliery Syndicate*.

[1904] A.C.
120

(d) The agent must contract for such things as the principal can, and lawfully may, do.

A man may adopt the wrongful act of another so as to make himself civilly responsible: but if an agent enter into a contract on behalf of a principal who is incapable of making it, or if he enter into an illegal contract, no ratification is possible. The transaction is void, in the one case from the incapacity of the principal, in the other from the illegality of the act.

Bird v.
Brown,
4 Ex 799.
Mann v.
Edinburgh
Northern
Tramways
Co., [1893]
A.C. 79

(e) The principal can only ratify the act of the agent,

if at the time when he purports to ratify he could himself do the act in question.

Thus a contract of insurance made by an agent without his principal's authority cannot be ratified by the principal after he has become aware that the event insured against has in fact occurred. The principal could not himself insure in such circumstances and he is not permitted to take advantage of the agent's unauthorized act.

Marine Insurance Act, 1906, s. 85
Grover v. Matthews,
[1910] 2
K.B. 401

It is, however, to be noted that contracts of marine insurance form an exception, which has now been made statutory, to this rule; but the Courts have stated that the exception is an anomalous one and is not to be extended.

Principal
may ratify
by words
or conduct

(f) The principal who accepts the contract made on his behalf by one whom he thereby undertakes to regard as his agent, may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may avow his responsibility for the act of his agent, or he may take the benefit of it, or otherwise by acquiescence in what is done create a presumption of authority given. Where conduct is relied upon as constituting ratification the relations of the parties and their ordinary course of dealing may create a greater or less presumption that the principal is liable.

CHAPTER XIX

Effect of the Relation of Principal and Agent

THE effects of the relation of Principal and Agent when created as described above may be thus arranged.

1. The rights and liabilities of principal and agent *inter se*.

2. The rights and liabilities of the parties where an agent contracts as agent for a named principal.

3. The rights and liabilities of the parties where an agent contracts for a principal whose name he does not disclose.

4. The rights and liabilities of the parties where an agent contracts in his own name but in reality for a principal whose existence he does not disclose.

I. THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT *INTER SE*

The relations of principal and agent *inter se* are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract—to establish privity of contract between his principal and third parties.

The principal must pay the agent such commission or reward for the employment, as may be agreed upon between them. He must also indemnify the agent for acts lawfully done and liabilities incurred in the execution of his authority.

The agent is bound, like every person who enters into a contract of employment, to account for such property of his principal as comes into his hands in the course of the employment; to use ordinary diligence in the discharge of his duties; to display any special skill or capacity which he may profess for the work in hand.

Relations
of principal
and
agent

Duty of
principal
to indemnify
or reward,
Adamson v
Jarvis,
4 Bing 66

of agent
to use
diligence;

Jenkins v
Betham,
15 C B 168

There are, besides these ordinary relations of employer and employed, certain duties, owing by the agent to the principal, which arise from the confidential character of the relations between them.

(1) Agent may make no profit other than commission:

(1) The agent must not, except with the knowledge and assent of his principal, make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment beyond the commission or remuneration agreed upon between them.

Regier v. Campbell Stuart, [1939] 1 Ch. 766

Where an agent is promised a reward or payment which might induce him to act disloyally to his principal, or might diminish his interest in the affairs of his principal, he cannot recover the money promised to him. If he obtains money by a transaction of this nature, he is bound to account for it to his principal, or pay it over to him. If he does not account for the money, it can be recovered by the principal as a debt due to the principal.

cannot recover promised reward,

Harrington v. Victoria Graving Dock Co., 3 Q.B.D. 549

An engineer in the employment of a railway company was promised by the defendant company a commission the consideration for which was, partly the superintendence of work to be done by them for the railway company, partly the use of his influence with the railway company to obtain an acceptance by them of a tender made by the defendant company. He did not appear in fact to have advised the railway company to its prejudice, but it was held that he could not recover in an action brought for this commission. 'It needs no authority to show that, even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.'

[1903] 2 K.B. 635 must account for it, if received, to principal or his representatives:

In *Andrews v. Ramsay*, the plaintiff, a builder, engaged the defendant, an auctioneer, to sell some property on the terms that he should receive £50 commission. Ramsay sold the property and received £20 commission from the purchaser. It was held that he was not only bound to pay over this £20 to his employer, but that he was not entitled to the £50 commission promised, and that though

this sum had already been paid it could be recovered. It would be easy to multiply illustrations of this principle.

But the agent is his principal's debtor, not his trustee for money so received. If the money is invested in land or securities, these cannot be claimed by the principal, any more than he can claim profits made out of the money the agent has had. The money constitutes a debt due to the principal, and it is this that he can recover.

It is open to the principal who discovers that his agent had been paid or promised, by the other party, a reward for bringing about the contract, to repudiate the transaction, and to recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by entering into the contract, without allowing any deduction for the amount of the bribe which he is entitled to recover from the agent. Nor is it material to inquire what was the effect of the payment or promise on the mind of the agent; no man can be allowed to have an interest which conflicts with his duty.

The Prevention of Corruption Act, 1906, now makes corrupt transactions of all kinds by or with agents criminal offences also and punishable by fine and imprisonment.

(2) The agent may not depart from his character as agent and become a principal party to the transaction, even though this change of attitude do not result in injury to his employer. If a man is employed to buy or sell on behalf of another he may not himself sell to his employer or buy of him.

Nor, if he is employed to bring his principal into contractual relations with others, may he assume the position of the other contracting party.

In illustrating these propositions we may usefully distinguish three transactions: a contract of sale, employment to buy upon commission, and employment to represent a buyer or seller: the second transaction is commission agency, which is not agency in the strict sense of the word, and only the third is genuine agency.

Lister & Co.
v. Stubbs, 45
Ch.D. 15

offer of
reward
makes
contract
voidable,
Mayor of
Salford v.
Lever,
[1891]
1 Q.B. 168

Shipway v.
Broadwood,
[1899]
1 Q.B. 373

(2) May
not be-
come prin-
cipal as
against
his em-
ployer
Armstrong
v. Jackson,
[1917]
2 K.B. 822

Compare
(a) sale,

(a) *A* may agree with *X* to purchase goods of *X* at a price fixed upon. This is a simple contract of sale and each party makes the best bargain for himself that he can.

(b) com-
mission
agency,

(b) Or *A* may agree with *X* that *X* shall endeavour to procure certain goods and when procured sell them to *A*, receiving not only the price at which the goods were purchased but a commission or reward for his exertions in procuring them.

Here we have a contract of sale with a contract of employment added to it, such as is usually entered into by a commission agent or merchant who supplies goods to a foreign correspondent. In such a case the seller procures and sells the goods not at the highest but at the lowest price at which they are obtainable: what he gains by the transaction is not a profit on the price of the goods but a payment by way of commission, which binds him to supply them according to the terms of the order or as cheaply as he can.

Ireland v.
Livingston,
L R. 5 H L.
407

Cassa-
boglou v.
Gibb, 11
Q B.D. 797

If a seller of goods warrants them to be of a certain quality he is liable to the buyer, on the non-fulfilment of the warranty, for the difference in value between the goods promised and those actually supplied. So too if a commission agent promises to procure goods of a certain quality and fails to do so the measure of damages is the loss which his employer has actually sustained, not any profit which he might have made.

See Salvesen
v Rederi,
&c, [1905]
A.C. 302

And here the person employed has no authority to pledge his employer's credit to other parties, but undertakes simply to obtain and supply the goods ordered on the best terms. Yet it would seem that he might not, without his employer's assent, supply the goods himself, even though they were the best obtainable and supplied at the lowest market price. This is an implied term in his contract of employment.

Rothschild
v Brook-
man, 2 Dow
& Cl. 188

and (c)
brokerage

(c) Or thirdly, *A* may agree with *X* that in consideration of a commission paid to *X* he shall make a bargain for *A* with some third party. *X* is then an agent in the true

sense of the word, a medium of communication to establish privity of contract between two parties.

Under these circumstances it is imperative upon X that he should not divest himself of his character of agent and become a principal party to the transaction. This may be said to arise from the fiduciary relation of agent and principal: the agent is bound to do the best he can for his principal; if he put himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Thus if a solicitor employed to effect a sale of property purchase it, nominally for another, but really for himself, the purchase cannot be enforced.

Agent to make a contract must remain agent

McPherson v. Watt, 3 App Ca 254

Not merely does the agent under such circumstances create for himself an interest antagonistic to his duty: he fails to do that which he is employed to do, namely, to establish a contractual relation between his employer and some other party. The employer may sustain no loss, but he has not got what he bargained for.

Robinson gave an order to Mollett, a broker in the tallow trade, for the purchase of a quantity of tallow. In accordance with a custom of the market unknown to Robinson, the broker did not establish privity of contract between his client and a seller, but simply appropriated to him an amount of tallow, corresponding to the order, which he had purchased from a selling broker.

Robinson v. Mollett, L K 7 H.L. 802

It was held that Robinson could not be required to accept goods on these terms, and that he was not bound by a custom of which he was not aware and which altered the 'intrinsic character' of the contract.

In *Johnson v. Kearley* the law on this subject was thus stated by Fletcher Moulton, L. J.:

[1908] 2 K B. 514

'To add on to the price of the article bought an arbitrary sum is a taking of profit and not a commission and is compatible only with a sale and resale. It is absolutely inconsistent with the duty of an agent for purchase, inasmuch as it is the essential idea of a

at p. 528

purchase through a broker or any other agent of the kind that the whole benefit of the purchase should go to the principal and that the sole interest of the agent should be in the commission allowed him by his principal. The office of a broker is to make privity of contract between two principals and this is utterly incompatible with making a contract at one price with the one and a corresponding contract at another price with the other.'

(3) May
not dele-
gate
authority

(3) The agent may not, as a rule, depute another person to do that which he has undertaken to do.

8 Ch.D. 320

The reason of this rule, and its limitations, are thus stated by Thesiger, L. J., in *De Bussche v. Alt*:

'As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract.'

The Lord Justice points out that there are occasions when such an authority must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency, 'and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself'. The establishment of the fiduciary relation between principal and sub-agent follows where privity of contract exists between the two, as is shown in *Powell & Thomas v. Evan Jones & Co.*

[1905]
1 K.B. 11

The rule is really an illustration of the more general rule that liabilities under a contract may not be assigned without the consent of the promisee.

Schmalzing v.
Thomlinson,
6 Taunt. 147

But where there is no such implied authority and the agent employs a sub-agent for his own convenience, no

privity of contract arises between the principal and the sub-agent. On default of the agent the principal cannot intervene as an undisclosed principal to the contract between agent and sub-agent. Nor can he treat the sub-agent as one employed by him, and follow and reclaim property which has passed into the sub-agent's hands.

New Zealand
Co. v.
Watson,
7 Q.B.D.
374

II. RIGHTS AND LIABILITIES OF THE PARTIES WHERE AN AGENT CONTRACTS FOR A NAMED PRINCIPAL

Where an agent contracts, as agent, for a named principal, so that the other party to the contract looks through the agent to a principal whose name is disclosed, it may be laid down, as a general rule, that the agent drops out of the transaction so soon as the contract is made.

Agent for
named
principal

drops out
when
contract
made,

Where the transaction takes this form only two matters arise for discussion: the nature and extent of the agent's authority; and the rights of the parties where an agent enters into contracts, either without authority, or in excess of an authority given to him.

We have seen that an inference that authority has been conferred by one person on another may arise from conduct, and this involves as a consequence that *X* cannot by private communications with *A* limit an authority which he has allowed *A* to assume.

Supra, p. 387

'There are two cases in which a principal becomes liable for the acts of his agent: one where the agent acts within the limits of his authority, the other where he transgresses the actual limits but acts within the apparent limits, where those apparent limits have been sanctioned by the principal.'

Maddick v.
Marshall, 16
C B , N S.
393

Jones employed Bushell as manager of his business, and it was incidental to the business that bills should be drawn and accepted from time to time by the manager. Jones, however, forbade Bushell to draw and accept bills. Bushell accepted some bills, Jones was sued upon them and was held liable. 'If a man employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority.'

Edmunds v.
Bushell and
Jones, L R.
1 Q.B. 97

Howard v
Sheward,
L R 2 C P.
148

Sheward, a horse-dealer, employed his brother to sell a horse to Howard, expressly desiring him not to warrant the horse. The brother nevertheless gave a warranty, and, the horse being in fact unsound, Howard obtained damages for its breach. The Court said that though the servant of a private individual, entrusted on one occasion to sell a horse, could not bind his master by a warranty given without authority, the agent of a horse-dealer had 'an ostensible authority, which could not be negatived by showing a secret understanding between the horse-dealer and his servant that the latter was not to warrant'.

Brady v
Todd, 9 C B.
(N S) 592

We may note here the authority with which certain kinds of agents are invested in the ordinary course of their employment.

Auc-
tioneer

(a) An auctioneer is an agent to sell property at a public auction. He is primarily an agent for the seller, but, upon the property being knocked down, he becomes also the agent of the buyer, but only for the purpose of recording the bidding '*at the time and as part of the transaction*', so as to provide a memorandum within the meaning of s. 40 (i) of the Law of Property Act, 1925, and of s. 4 of the Sale of Goods Act. He has not merely an authority to sell, but actual possession of goods to be sold, and a lien upon them for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce such terms into the contract made with the buyer as to render himself personally liable.

Bell v Bolls,
[1897] 1 Ch
671

Chaney v
Macdow,
[1929]
1 Ch 461

But the principal will be bound if the auctioneer act within his apparent authority, though he disobey instructions privately given. An auctioneer through inadvertence and contrary to instructions put up an article for sale without reserve. His principal was bound by the terms of sale. But where there is a sale by auction with *notice* that it is subject to a reserve, the auctioneer has no

Woolfe v
Horne, 2
Q B D 355

Rainbow v.
Howkins,
[1904]
2 K B 326

McManus v
Fortescue,
[1907]
2 K.B. 1

authority to accept a bid less than the reserve fixed, and cannot bind his principal by doing so.

(b) A factor by the rules of Common Law and of mercantile usage is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.

He further has a lien upon the goods for the balance of account as between himself and his principal, and an insurable interest in them. Such is the authority of a factor at Common Law, an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent.

At Common Law, says Blackburn, J.,

'the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.'

The Common Law regarded the owner of goods as having so acted as to clothe a factor with apparent authority to *sell*, but not to *pledge*, goods placed in his possession; but his presumed authority has been extended by a series of Factors Acts now consolidated in the Factors Act, 1889. Speaking of the general intention of the earlier Acts, Blackburn, J., says:

'The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such

Factor

Prkering
v Busk,
15 East 38

Cole v.
N W. Bank,
L R 10 C P.
at p 363

Ibid. at
p 372

agency sells or pledges the goods, he should be deemed by that act to have misled anyone who bona fide deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance.'

- s. 1 The Act of 1889 applies not only to factors, but to any 'mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, s. 2 or to raise money on the security of goods'; and in effect it provides that where a 'mercantile agent' is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition made by him to a person acting in good faith and without notice of the agent's want of authority, in the ordinary course of his business as a mercantile agent, is as valid as if expressly authorized by the owner of the goods.

Lowther v.
Harris,
[1927] 1
K.B. 393

Weiner v.
Harris,
[1910]
1 K.B. 285

Persons therefore who, in good faith, advance money on the security of goods or documents of title are thereby entitled to assume that the possession of the goods, or of the documents of title to them, carries with it an authority to pledge them; and this is so even though as between the factor and his principal the authority is expressly withheld.

And so long as the agent is left in possession of the goods, revocation of authority by the principal does not prejudice the right of the buyer or pledgee if the latter has not notice of the revocation at the time of the sale or pledge.

It should, perhaps, be added that where the possessor is not a 'mercantile agent' the mere possession of the goods of another, with the consent of the owner, does not of itself confer an apparent authority to sell or pledge them. For example, if goods are delivered into the possession of another with an option to buy or return them or on a hire-purchase agreement, the owner is not precluded from denying the validity of a disposition made

Helby v.
Matthews,
[1895]
A.C. 471

by the possessor without his consent. The effect of the Factors Act, 1889, ss. 8 & 9, and of the Sale of Goods Act, 1893, s. 25, is, however, to place a person who, having sold goods, continues or is in possession of the goods or the documents of title to them, and a person who, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to them, in the position of a 'mercantile agent' in this respect.

(c) A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale he has not possession of the goods, and so he has not the authority thence arising which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him. Broker

The forms of a broker's notes of sale may be useful as illustrating what has hereafter to be said with reference to the liabilities of parties where an agent contracts for a principal whose name or whose existence he does not disclose.

Normally when a broker makes a contract he puts the terms into writing and delivers to each party a copy signed by him. The copy delivered to the seller is called the sold note, that delivered to the buyer is called the bought note. The sold note begins 'Sold for *A* to *X*' and is signed '*M* broker', the bought note begins 'Bought for *X* of *A*' and is signed '*M* broker'. But the forms may vary and with them the broker's liability. We will follow these in the sold note.

Forms of
bought
and sold
notes

(i) 'Sold for *A* to *X*' (signed) '*M* broker'. Here the broker cannot be made liable or acquire rights upon the contract: he acts as agent for a named principal.

Fairlie v.
Fenton,
L.R. 5 *Ex.*
169

(ii) 'Sold for you to our principals' (signed) '*M* broker'. Here the broker acts as agent, but for a principal whom he does not name. He can only be made liable by the usage of the trade if such can be proved to exist.

Fleet v.
Murton,
L.R. 7 *Q.B.*
126

(iii) 'Sold by you to me' (signed) '*M*'. Here we suppose that the broker has a principal, though his existence is

Southwell v.
Bowditch,
1 *C.P.D.*
374

Higgins v.
Senior,
8 M & W.
834

not disclosed, nor does the broker sign as agent. He is personally liable, though the seller may prefer to take, and may take, the liability of the principal when disclosed; and the principal may intervene and take the benefit of the contract.

Commis-
sion agent

Ireland v.
Livingston,
L.R. 5 H L.
407

(d) A commission agent is, as was described above, a person employed, not to establish privity of contract between his employer and other parties, but to buy or sell goods for him on the best possible terms, receiving a commission as the reward of his exertions.

Del credere
agent

Ante, p 69

(e) A *del credere* agent is an agent for the purpose of sale, but one who also gives (in consideration of a higher remuneration) an undertaking to his employer that the parties with whom he is brought into contractual relations will pay the money which may become due under the contract into which they enter.

Harburg
India Rubber
Comb Co
v Martin,
[1902]
1 K B. 778,
786

He does therefore promise to 'answer for the default' of another, and his contract at first sight appears to require evidence in writing, by reason of s. 4 of the Statute of Frauds. The Courts have held, however, that where the obligation to answer for another's default is only an incident in a larger contract (e.g. of *del credere* agency), then s. 4 has no application, and no note or memorandum in writing is necessary.

Gabriel v.
Churchill &
Sim, [1914]
3 K B 1272

But the *del credere* agent does not guarantee the performance of the contract otherwise than as regards *payment*; and thus cannot be sued by a vendor of goods whom he has brought into contractual relations with a purchaser, because the purchaser refuses to take delivery.

Agent
cannot sue
or be sued

We have said that as a rule the agent contracting within his authority for a named principal drops out of the transaction, and therefore acquires neither rights nor liabilities on a contract so made.

But this matter is always one of the proper construction to be put upon the conduct of the parties where the contract is oral, or upon the wording of the document

and the surrounding circumstances where it is in writing. There is nothing to prevent both principal and agent being severally liable on, and entitled to enforce, a contract which the agent has made on behalf of his principal, if that was the intention of the parties. The rules which follow are, therefore, liable to be displaced by evidence of a contrary intention of the parties.

Calder v. Dobell,
L.R. 6
C.P. at
p. 494

Generally the agent cannot sue; for the party with whom he contracted has been induced by him to look to the named principal, and cannot, unless he so choose, be made liable to one with whom he dealt merely as the mouthpiece of another.

Bickerton v. Burrell,
5 M. & S.
383.
Repetto v. Millar's Karri & Jarrah Forests,
[1901]
2 K.B. 306

With a few exceptions he cannot be sued.

An agent who makes himself a party to a deed is bound thereby, though he is described as agent. This arises from the formal character of the contract, and the technical rule that 'those only can sue or be sued upon an indenture who are named or described in it as parties'.

Ex-
ceptions
Deed
Beckham v. Drake, 9
M. & W. 95

It is said that an agent who contracts on behalf of a foreign principal has, by the custom of merchants, no authority to pledge his employer's credit and becomes personally liable on the contract. But there are decisions which make it doubtful if this rule still exists. There may have been good reason for it in former days before the development of modern means of communication with foreign countries; but to-day these no longer hold good. At most there may be a presumption that an agent acting for a foreign principal has no authority to pledge his principal's credit, but this presumption may be rebutted by evidence of facts showing that the agent assumed no personal liability. And in any case the custom, if it exists, is one which makes the agent liable to the exclusion of the principal, and cannot prevail if inconsistent with the actual terms of the contract.

Foreign
principal
Armstrong v. Stokes,
L.R. 7 Q.B.
605

Miller, Gibb & Co. v. Smith & Tver, [1917]
2 K.B. 141

If an agent contracts on behalf of a principal who does not exist or cannot contract, he is personally liable on a contract so made.

Non-
existent
principal

L.R. 2 C.P.
175

The case of *Kelner v. Baxter* was cited above to show that a company cannot ratify contracts made on its behalf before it was incorporated: the same case establishes the rule that the agent so contracting incurs the liabilities which the company cannot by ratification assume. 'Both upon principle and upon authority', said Willes, J., 'it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable.' An alternative basis for the liability in this case might, it seems, have been a breach of warranty of authority.

Remedies
against
agent who
contracts
without
authority

If a man contracts as agent, but without authority real or ostensible, for a principal whom he names, he cannot bind his alleged principal or himself by the contract: but the party whom he induced to contract with him has one of two remedies.

Warranty
of au-
thority

(a) He may sue upon a *warranty of authority*.

Collen v
Wright,
8 E. & B. 647

This is an implied promise to the other party that in consideration of his making the contract the professed agent warrants that he has a principal and that he is contracting within the authority conferred by that principal.

Starkey v.
Bank of
England,
[1903] A.C.
114

British Rus-
sian Gazette
v. Associated
Newspapers,
[1933]
2 K.B. 616
Firbank's
Exors. v
Humphreys
18 Q B D
54

This rule applies not only to transactions or representations which would result in contract; it extends to any representation of authority whereby one induces another to act to his detriment.

The liability may be treated—as it has been by the Court of Appeal—as an exception to the general rule of law that 'an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another'. But the relation is better treated as one of contract; 'the true principle', says Buckley, L. J., in *Yonge v. Toynbee*, 'as deduced from the authorities, rests, I think, not upon wrong or omission of right on the part of the agent, but upon implied contract'. This same case lays down that the warranty is a continuing warranty

[1910]
1 K.B. at
p. 228

and therefore the agent is liable even though his authority be determined without his knowledge, as by the death or insanity of the principal.

(b) If the professed agent knew that he had not the authority which he assumed to possess, he may be sued by the injured party in an action of deceit.

Action
of deceit

The case of *Polhill v. Walter* is an illustration of this. The defendant accepted a bill as agent for another who had not given him authority to do so. He knew that he had not the authority but honestly expected that his act would be ratified. It was not ratified, the bill was dishonoured, and the defendant was held liable to an indorsee of the bill as having made a representation of authority false to his knowledge, and falling under the definition of Fraud given in a previous chapter.

3 B. & Ad.
114

The reason why the alleged agent should not be made personally liable on such a contract is plain. The man whom he induced to enter into the contract did not contemplate him as the other party to it, or look to any one but the alleged principal.

III. RIGHTS AND LIABILITIES OF THE PARTIES WHERE THE NAME OF THE PRINCIPAL IS UNDISCLOSED

An agent who contracts as agent but does not disclose the name of his principal is, as a rule, not personally liable on the contract which he makes; but here, too, as where the name of the principal is disclosed, the matter is one of construction.

Where
principal
is un-
named,
agent not
liable if he
contract
as agent

'There is no doubt at all in principle', said Blackburn, J., in *Fleet v. Murton*, 'that a broker as such, merely dealing as broker and not as purchaser, makes a contract, from the very nature of things, between the buyer and seller, and is not himself either buyer or seller, and that consequently where the contract says "sold to AB" or "sold to my principals" and the broker signs himself simply as broker he does not make himself by that either the purchaser or seller of the goods.'

Gadd v.
Houghton,
1 Ex. D. 357
L R 7 Q.B.
126

And see
*Southwell v.
Bowditch*,
1 C.P.D. 374

On the other hand, an agent who contracts for an unnamed principal, *without expressly contracting as agent*,

Excep-
tions

Hutcheson
v. Eaton,
13 Q B D.
861

will be personally liable; and it may be noted that in the absence of words indicating agency, the word 'broker' attached to a signature is merely descriptive, and does not limit liability. If therefore the agent does not by words exclude himself from liability, one who deals with an agent for an unnamed principal is entitled to the alternative liability of the principal and the agent.

Thomson v.
Davenport,
9 B & C 78

Even where the agent is distinctly described as such, the usage of a trade, as in *Fleet v. Murton*, may make him liable. But 'in the absence of such a custom, and where a principal exists, the general rule applies, although the principal be not named or be a foreigner'.

L.R. 7 Q B
126

Universal
Steam
Navigation
Co v James
McKelvie &
Co., [1923]
A C *per*
Cave, L.C.,
at p 496

Where a man has purported to contract as agent for an unnamed principal, he may declare himself to be the real principal. For if the other party to the contract was willing to take the liability of an unknown person, it is hard to suppose that the agent was the one man in the world with whom he was unwilling to contract; and at any rate the character or solvency of the unnamed principal could not have induced the contract.

16 Q B 655

Thus in *Schmalz v. Avery*, Schmalz sued on a chartering contract into which he had entered 'on behalf of another party' with Avery. He had named no principal and it was held that he might repudiate the character of agent and adopt that of principal; and this decision has been followed in a later case.

Harper v
Vigers,
[1900]
2 K B 549

IV. RIGHTS AND LIABILITIES OF THE PARTIES WHERE THE EXISTENCE OF THE PRINCIPAL IS UNDISCLOSED

Alterna-
tive liabi-
lity where
principal
is undis-
closed

If the agent acts on behalf of a principal whose existence he does not at the time disclose, the other contracting party, when he discovers the true facts, is entitled to elect whether he will treat principal or agent as the party with whom he dealt. The reason of this rule is plain. If *A* enters into a contract with *X* he is entitled at all events to the liability of the party with whom he supposes himself to be contracting. If he subsequently discovers that *X* is in fact

the representative of *M* he is entitled to choose whether he will accept the actual state of things, and treat *M* as the party to the contract, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat *X* as the party to it.

Curtis v. Wilhamson,
L R 10 Q B.
57

The rule of evidence has already been explained by which a man who has contracted as principal may be shown to be an agent. Where a contract is ostensibly made between *A* and *X*, *A* may prove that *X* is agent for *M* with a view of fixing *M* with the liabilities of the contract. But *X* cannot, by proving that *M* is his principal, escape the liabilities of a contract into which he induced *A* to enter under the supposition that he (*X*) was the real contracting party. Neither party may escape any liability which he assumed under the contract, but *A* is permitted to prove that his rights are wider than the words of the contract would indicate.

Trueman v. Lodei,
11 Ad & E
589
Higgins v. Senior,
8 M & W.
834

It has been held that in such a case *M* will be bound not only by acts which *X* had actual authority from him to perform, but by all acts which fall within the authority usually conferred upon an agent of the character in question.

Watteau v. Fenwick,
[1893]
1 Q B 346
Kutahan v. Parry, [1910]
2 K B. 389

Moreover, not only may the real principal, *M*, be made liable on the contract; he may also intervene and sue upon it. In that case, however, *A* may set up against *M* any set-off which is available to *A* against *X* the agent, and which accrued while *A* still supposed that he was dealing with *X* as principal.

Defence
against
agent
available
against
principal

This rule rests upon the doctrine of estoppel, for

Montagu v. Forwood,
[1893] 2 Q B.
350

'It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.'

Cooke v. Eshelby,
12 App. Cas.
per Lord
Watson, at
p 278

This being the basis of the rule it was held that it had no application in a case where the other contracting party dealt with brokers whom he knew to be in the habit of

Ibid. at
p. 277

selling, sometimes as brokers for principals, and sometimes as principals on their own account. In such circumstances, 'if he chooses to purchase without inquiry, he does so with notice that there may be a principal for whom the broker is acting as agent; and should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent'.

This right of an undisclosed principal to intervene must be distinguished from a case of Ratification. We are dealing here with cases in which a contract is made by one who is in fact, at the time the contract is made, an agent, though the existence of his principal is not disclosed to the other party. The rules of Ratification apply to a contract made by one who is not an agent when he makes the contract, though he purports to contract as one, or made by an agent in excess of the authority which he holds from his principal; he makes the contract on behalf of another, but without that other's precedent authority. It may be argued that if an undisclosed principal is allowed to intervene although his existence was unknown to the other party to the contract, there is no reason in logic why a person should not be allowed to ratify and adopt a contract made by one who was not his agent at the time, but this is not the law. The truth is that the right of the undisclosed principal to intervene at all is an anomaly in the law, and the Courts have shown that they are not prepared to extend it on merely logical grounds.

Keighley
Maxsted &
Co. v.
Durant,
[1901] A.C.
per Lord
Mac-
naghten,
at p. 246

Collins v.
Associated
Greyhound
Racecourses,
[1930]
1 Ch. 1

The right of an undisclosed principal to intervene, and his liability to be sued by the person with whom his agent has contracted, are, however, excluded if the agent has contracted in terms which import that he is the real and only principal, for then the idea of agency is incompatible with the construction of the terms of the contract.

Humble v.
Hunter,
12 Q.B. 310

Thus where an agent in making a charter-party described himself therein as owner of the ship it was held that evidence was not admissible to prove that another person was the real owner and the agent's principal, for this would have contradicted the terms of the contract. It was

therefore held that his principal could not intervene, nor, by parity of reasoning, could he be sued. But where the agent merely described himself as 'charterer', evidence was admitted to show who the real principal was, and he was allowed to intervene and sue on the charter. 'Charterer' is an equivocal description, 'owner' is not.

Drughorn v. Red. Transatlantic,
[1919]
A.C. 203

The right of the other contracting party to sue agent or principal—to avail himself of an alternative liability—may be determined in various ways; he then becomes limited to one of the two and has no longer the choice of either liability.

Alternative liability, how concluded

(a) If the other party to the contract after having discovered the existence of the undisclosed principal do anything which unequivocally indicates the adoption of either principal or agent as the party liable to him, his election is determined and he cannot afterwards sue the other.

Scarf v. Jardine, 7
App. Cas.
345

(b) If, before he ascertain the fact of agency, he sue the agent and obtain judgment, he cannot afterwards recover against the principal. But merely to bring an action under these circumstances would not determine his rights. 'For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other.'

Per Lord Cairns, Hamilton v. Kendall,
4 App. Ca.
514

Priestly v Fernie,
3 H. & C.
984

(c) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, there is authority for saying that he cannot be sued when he is discovered to be the purchaser.

In *Armstrong v. Stokes* the defendants employed Messrs. Ryder, a firm of commission merchants, who carried on business sometimes for themselves and sometimes as agents, to buy goods for them. Messrs. Ryder bought the goods in their own names from the plaintiff, who gave credit to them and to no one else. The defendants paid Messrs. Ryder for the goods in the ordinary course of business, and a fortnight later Messrs. Ryder stopped payment, not having paid the plaintiff. When it appeared from their books that they had been acting as agents for the defendants, Armstrong claimed to demand payment

L.R. 7 Q.B.
598

from the undisclosed principals. It was held that the demand could not be made from 'those who were only discovered to be principals *after they had fairly paid the price to those whom the vendor believed to be principals, and to whom alone the vendor gave credit*'.

Heald v
Kenworthy,
10 Exch 739

5 Q.B.D.
107, 414

But *Armstrong v. Stokes* is contrary to earlier authority, and it has been criticized by the Court of Appeal in a later case, where, however, the existence of the principal was known, though his name was not disclosed. In *Irvine v. Watson* the agent was a broker known to be buying for principals, and at least in such a case, if the principal settles accounts with his agent before the ordinary period of credit has expired, he is not thereby discharged; for if he were, the seller would be deprived of a liability to which he was induced to look when he entered into the contract. But Bramwell, L. J., thought that it was difficult to see 'how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal'.

Misrepresentation or Non-disclosure by Agent

Agent's
misre-
presenta-
tion or
non-dis-
closure

When a contract is made through an agent, a misrepresentation by him, or, if the contract is one *uberrimae fidei*, his failure to disclose a material fact, renders the contract voidable by the other party just as would misrepresentation or non-disclosure on the part of the principal himself. Nor, so far as concerns the invalidating of the contract, does it make any difference whether a misrepresentation was made fraudulently or innocently. That distinction becomes important only when the question relates to the liability of the principal in damages for the tort of deceit.

How far
know-
ledge of
agent is
know-
ledge of
principal

Re Drabble
Bros., [1930]
2 Ch. 211

In general it is true to say that where the state of mind of a party to a contract is material, the law regards the principal and the agent as one. Thus in a contract *uberrimae fidei* if there is a failure to disclose material facts which are known to the agent but not to the principal or vice versa, the contract may be avoided.

But the formula that the knowledge of the agent is the knowledge of the principal is correct only 'where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal'.

Blackburn
v. Vigors,
12 App. Cas.
per Lord
Halsbury,
at p. 538

A principal effected a policy on a ship through a broker, neither of them being aware of any material fact not disclosed to the insurers, and the principal sued the insurers on this policy. But the principal had previously employed another broker to negotiate a policy on the same ship, and this broker, from the accident that he was also agent for another person, had acquired information, before effecting the insurance through his London agent, of a material fact which he had not disclosed to the principal; the policy effected by this broker was not sued on. The House of Lords refused to allow the policy now sued on to be avoided by imputing knowledge of this material fact to the principal.

So, too, where a person effecting an insurance allowed the agent of the company to fill up the proposal form and signed it without checking the answers, it was held that the agent's knowledge that the answers were false could not be imputed to the company. For it is no part of the duty of the agent of an insurance company to fill in the answers of the proposer. On the contrary in filling in the answers the agent had acted as the agent of the proposer; his knowledge of their falsity was the proposer's, and the contract could not stand.

Newsholme
Bros v Road
Transport
Insurance
Co., [1929]
2 K B 356

Still less can the knowledge of the agent be imputed to the principal where the agent is himself a party to a fraud on his principal by the other party to the contract. So in *Wells v. Smith*, where the defendant made a statement to the agent of the plaintiff which they both knew to be false and intended to be acted on by the plaintiff, Scrutton, J., held that the defendant could not protect himself by proving that the agent knew of the untruth of the statement.

[1914
3 K.B. 722

CHAPTER XX

Determination of Agent's Authority

AN agent's authority may be determined in any one of three ways: by agreement; by change of status; or by death.

§ 1. *Agreement*

Agree-
ment

The relation of principal and agent is founded on mutual consent, and may be brought to a close by the same process which originated it, the agreement of the parties.

Where this agreement is expressed by both parties, or where, at the time the authority was given, its duration was fixed, the matter is obvious and needs no discussion.

Where authority is determined by revocation it must be borne in mind that the right of either party to bring the relation to an end by notice given to the other is a term in the original contract of employment.

Limits of
right to
revoke

Ante, p. 401

But the principal's right to revoke is affected by the interests (1) of third parties, (2) of the agent.

(1) A principal cannot privately limit or revoke an authority which he has allowed his agent publicly to assume. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.

5 Q.B.D.
394.
6 App. Ca
24

Illustra-
tion from
case of
husband
and wife

The case of *Debenham v. Mellon* is a good illustration of the nature and limits of this right of revocation.

A husband who supplied his wife with such things as might be considered necessities for her forbade her to pledge his credit; any authority she might ever have enjoyed for that purpose was thereby determined. She dealt with a tradesman who had not before supplied her with goods on her husband's credit and had no notice of his refusal to authorize her dealings. He supplied these goods on the husband's credit and sued him for their price. It was held that the husband was not liable.

But it was pointed out that where a husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has thus induced to look to him for payment, revoke her authority without notice.

'If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume.'

Debenham
v. Mellon,
5 Q.B.D.
403

The case of husband and wife is perhaps the best, as it is the strongest, illustration of the limits within which the principal may revoke an authority consistently with the rights of third parties.

(2) The right of revocation may be expressly or impliedly limited by the liability of the employer to indemnify the agent from loss occurring in consequence of the employment.

Cases
where
agent
acquires
interest

The rule laid down that 'an authority coupled with an interest is irrevocable' is explained by Wilde, C. J., in *Smart v. Sandars*, to mean that 'where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest.' An illustration of the application of this principle is to be found in *Carmichael's* case. But the rule has a somewhat wider application, as appears from the language of Bowen, L. J., in *Read v. Anderson*, where the revocation of authority to carry out a contract would have involved an injury to the agent which must have been in contemplation of the parties when the contract of employment was made.

5 C.B. 917

[1896] 2 Ch.
648

13 Q.B.D.
779

or incurs
liability

'There is a contract of employment between the principal and the agent which expressly or by implication regulates their rela-

at p. 782

tions; and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business he cannot be allowed to break his contract.'

§ 2. *Change of Status*

Bank-
ruptcy

Bankruptcy of either party brings an agency to an end for most purposes.

Insanity
[1910]
1 K B. 215

Yonge v. Toynbee must apparently be taken to have decided that insanity annuls an authority properly created while the principal was sane. In that case the defendant, after instructing his solicitors to defend on his behalf a threatened action, became insane. The solicitors, in ignorance of this, duly entered an appearance to the writ, and took all necessary steps on their client's behalf. When the defendant's insanity became known to the plaintiff, he sought to have the appearance and all subsequent proceedings struck out, and to make the solicitors personally liable for costs incurred, on the ground that their authority to act had been determined by the defendant's insanity; and the Court of Appeal decided in his favour, holding that the solicitors had warranted an authority which they had ceased to possess.

Ande, p. 139

The rule which appears to be thus established, namely, that the insanity of the principal determines the authority of an agent whether the agent is aware of it or not, leads to a curious result. For if *X* makes a contract directly with *Y*, who is insane, the contract, as we have seen, is binding unless *X* knew of *Y*'s condition; yet if he attempts to make the same contract through an agent whom *Y*, while sane, has duly appointed to represent him, no contract will come into existence, though neither *X* himself nor *Y*'s agent knew of *Y*'s insanity. Further, if *X* and *Y* make a binding contract, and *Y* subsequently, unknown to *X*, becomes insane, the contract is not in general avoided by that event. *Yonge v. Toynbee*, however, obliges us to say that if the contract is one of agency it will be an exception to this general principle.

The case is also not easy to reconcile with the earlier decision of the Court of Appeal in *Drew v. Nunn*, which, although cited in *Yonge v. Toynbee*, was not referred to in the judgments of the Court. The defendant there, being at the time sane, gave authority to his wife to deal with the plaintiff and afterwards became insane. The wife continued to deal with the plaintiff and gave no notice of her husband's insanity; the defendant recovered and resisted payment for goods supplied while he was insane. The Court of Appeal did not expressly decide how far insanity affected the continuance of authority, but held that 'the defendant, by holding out his wife as agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked he was entitled to act on the defendant's representations'.

No doubt the points at issue in these two cases were different, for in the one the liability of the agent, in the other that of the principal, was in question. But if the two cases are to stand together we must say that when a principal becomes insane, the third party who has made a contract with his agent has a choice of remedies. He may either enforce the contract against the principal, or he may sue the agent for having warranted that he could bind the principal by the contract and having broken his warranty. But there are at least two difficulties in such a method of reconciliation. In the first place, it may be reasonable that the law should secure that the position of the third party should not be prejudiced by the insanity of the person with whom he imagines himself to be contracting; and this is exactly what *Drew v. Nunn* does. But it surely cannot be reasonable that the principal's insanity should place the third party in a position which is actually more favourable than it would have been if the principal had remained sane, for then he would have been limited to his remedy against the principal. In the second place, if the principal is bound by the contract

Rainbow v.
Howkins,
[1904]
2 K.B. 322

which the agent purported to make for him, it is hard to see how the agent has broken his warranty at all, or if he has technically broken it, what damage the third party has suffered, since his rights against the principal are exactly what the agent professed to be able to create for him. If the attempt to reconcile the two cases leads to these anomalous results, it may be necessary to choose between them, and in that case it may be hoped that the House of Lords will some day establish the authority of *Drew v. Nunn* in preference to that of *Yonge v. Toynbee*.¹

1917] 2 Ch.
144

Enemy
status

Ante, p. 120

The question was raised in *Tingley v. Müller* whether an agent's authority is determined on his principal becoming an alien enemy. The full Court of Appeal (Scrutton, L. J., dissenting) held that it was not necessarily determined, though, as in the case of other contracts with alien enemies, this would happen, if the agency involved intercourse with the principal (as it usually would) or was otherwise against public policy. In that case a German, resident in England by the licence of the Crown and for the time being therefore technically an alien friend, gave an irrevocable power of attorney to an agent and afterwards returned to Germany, thereby becoming in the full legal sense an alien enemy. The agent, acting under the power of attorney, entered into a contract for the sale of land, and it was held that the purchaser, when he discovered the facts, was not entitled to refuse to complete. The decision was based in part on the exceptional incidents of an agency created by an irrevocable power of attorney, but the majority of the Court evidently thought that no absolute rule exists to the effect that the acquisition of enemy status determines a contract of agency. Nevertheless the dissenting judgment of Scrutton, L. J., is perhaps more in

¹ The authority of *Yonge v. Toynbee* is also weakened by the doubts expressed in the judgment of Vaughan Williams, L. J. Another member of the Court, Swinfen Eady, J., attached importance to the fact that the defendants were solicitors, that is to say, officers of the Court, and said that it was essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing his client.

harmony with later decisions of the House of Lords on the effect of war upon an alien enemy's contracts, and in *Sovfracht v. Van Udens Scheepvaart*, where, however, the same point did not actually arise for decision, some of the members of the House were evidently doubtful about its correctness.

[1943] A.C.
203

§ 3. *Death of Principal*

The death (or if the principal is a corporation the dissolution) of the principal determines at once the authority of the agent,¹ leaving the third party to his remedy against the agent for breach of warranty of authority in the case of contracts entered into by him in ignorance of the principal's death. It was once thought that in such cases an agent would only be liable if his ignorance of the principal's death was due to some default or omission of his own. But in so far as *Smout v. Ilbery* was an authority for this proposition, it has apparently been overruled by *Yonge v. Toynbee*, cited above. The agent is liable whether he represented himself as having an authority which he has never possessed, or as having an authority which has determined without his knowledge, even though he had no means of finding it out.

Death

Campanari
v Wood-
burn, 15
C.B. 400

10 M. & W. 1

[1910]
1 K.B. 215
Blades v.
Free,
9 B. & C.
167; but see
Drew v.
Nunn,
4 Q.B.D.
per Brett,
L.J., at
p. 668

¹ This statement should be qualified in respect of powers of attorney. By s. 124 of the Law of Property Act, 1925, a person making or doing any payment or act in good faith, in pursuance of a power of attorney, is not liable in respect thereof by reason of the death, lunacy, or bankruptcy of the donor of the power or by reason of its revocation, if the circumstances were unknown to him at the time. By ss. 126 and 127 of the same Act, a power of attorney may under certain conditions be expressed to be irrevocable, in which case the authority of the donee of the power is not affected even by notice of the death, &c., of the donor.

CHAPTER XXI

Quasi-Contract¹

§ 1. *The Nature of Quasi-Contract*

CIRCUMSTANCES must occur under any system of law in which it becomes necessary to hold one person to be accountable to another, without any agreement on the part of the former to be so accountable, on the ground that otherwise he would be retaining money or some other benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability the other would unjustly suffer loss. The law of quasi-contract exists to provide remedies in circumstances of this kind.

The term is not a happy one, though the history of this branch of the law provides some justification, or at least an explanation, of it. But it implies a resemblance to contract which is never very close, and which sometimes does not exist at all. Unfortunately, however, the difficulty of inventing a better name which would have a chance of being accepted has not yet been overcome.

It is difficult, too, to find a satisfactory definition of a quasi-contract, for almost all the suggested definitions either exclude cases which our law considers to be quasi-contracts, or include cases which it does not. If English law had developed according to some scientific plan, quasi-contract would probably include many cases in which the

¹ The subject of quasi-contract has been much discussed recently both in the Courts and in legal writings, but there does not yet exist any comprehensive treatment of it. In these circumstances it is thought that the reader may like to be referred to some of the current literature in which he will find a fuller treatment of some of the questions discussed in this chapter. The following will be found useful: Winfield, *The Province of the Law of Tort*, Ch. VII, on 'Tort and Quasi-contract'; Jackson, *History of Quasi-contract*; Holdsworth, 'Unjustifiable Enrichment', in *L.Q.R.* 1939, p. 37; Allen, 'Fraud, Quasi-contract, and False Pretences', in *L.Q.R.* 1938, p. 201; Friedmann, 'The Principle of Unjust Enrichment in English Law', in *Canadian Bar Review*, 1938, pp. 243 and 365. A few other articles are referred to at the points where this chapter deals with the questions to which they particularly relate.

law compels the restitution of money or other benefit, which, for historical reasons, we now classify under other rubrics of the law, and especially under the law of trusts. As it is, it will be best to content ourselves with trying to enumerate the distinctive marks of a quasi-contractual right.

Such a right is always (a) a right to money, and generally, though not always, to a liquidated sum of money; (b) a right which does not arise from any agreement of the parties concerned, but is imposed by the law, so that in this respect a quasi-contract resembles a tort; (c) a right which is available not, like the rights protected by the law of torts, against all the world, but against a particular person only, so that in this respect it resembles a contractual right.

§ 2. *The History and the Modern Basis of Quasi-Contract*

We must now take up again the history of the remedies which the Courts developed for enforcing contracts at the point to which we carried it in the first chapter. We saw there that one of the results of *Slade's case* was to allow *indebitatus assumpsit* to be brought, where a contract had brought into existence a debt, alternatively to the action of Debt, and that soon after the same remedy was extended to cases where there had been no express promise to pay a sum owing, provided that such a promise could be implied from the conduct of the parties at the time the bargain was made. But towards the end of the seven-
teenth century the Courts went further than this. So far they had allowed *indebitatus assumpsit* to be an alternative to Debt where there had been an actual promise express or implied; they now began to allow it where there had been no promise of any kind, where the debt was owing because the law had created an obligation to pay it. Debt, it will be remembered, was a recuperatory action; the gist of it was that the plaintiff was claiming money which in justice already belonged to him and was being wrongfully detained from him by the defendant, and the reason the

4 Co Rep
92 b

money was considered to belong to the plaintiff in this way might either be because the defendant had promised to pay it, or because the law in its wisdom said that he ought to pay it for some other reason. So now *indebitatus assumpsit*, having already been allowed for a debt arising in the first of these ways, began to be allowed for one arising in the second way, and the device that the Courts adopted in order to make this possible was to allow the creditor to allege that the debtor had *promised* to pay the sum which the law said that he owed, although he had done nothing of the sort. The creditor was allowed to plead that the debtor 'being indebted had promised', and all that he had to prove was the debt; if he did that, the Court would not allow the debtor to 'traverse' the allegation of a promise, or in other words to prove that in fact he had never really promised to pay the debt at all. The alleged promise was a purely procedural fiction implied by the law in order to bring the facts of the case within the requirements of the action of *indebitatus assumpsit*. As one would expect there was at first opposition to the adoption of so flagrant a piece of make-believe, especially from Sir John Holt, who was Chief Justice of the King's Bench from 1689 to 1710. But he failed to prevent its acceptance into the law, for the driving force behind it was the same as it had been in the history of *assumpsit* all along, namely, the greater convenience of the new remedy over the existing remedies provided by the law. *Indebitatus assumpsit*, however, did not supersede the action of Debt; it was an alternative method of procedure, and Debt remained an action which was not only theoretically possible but was actually used.¹

¹ The following passage from the 3rd edition of Bullen and Leake's *Precedents of Pleadings* (1868) pp. 35-6, sets out the position clearly:

'Before the Common Law Procedure Act, 1852, it was necessary to specify in the writ the particular form of action adopted, and the form of the declaration varied accordingly. Causes of action of the above nature (*sc.* for debts) might then be made the subject either of an action of *debt* or of an action of *assumpsit*. When framed in *debt*, the declaration stated the debt, and then averred that by reason of the non-

This was the state of the law when Lord Mansfield, the real founder of our modern law of quasi-contract, became Chief Justice of the King's Bench in 1756. 'Mansfield', says Sir William Holdsworth, 'found an incoherent set of rules stated in a number of heterogeneous cases, and if there was one principle at their back, it was the innate feeling of the judges that it was just and equitable that a convenient remedy should be given in these cases.' In 1760, in his great judgment in *Moses v. Macferlan*, Lord Mansfield set himself to rationalize these materials; but the principles which he laid down were no innovation; they were merely principles which had long been implicit in the decisions which the Courts had been making, but had not hitherto been systematically expounded.

History of
English
Law, viii,
p. 97

2 Burr. 1005

Speaking of the action of *indebitatus assumpsit*, Lord Mansfield said:

'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu", as the Roman Law expresses it.)'

at p. 1008

Later he goes on:

'This kind of equitable action,¹ to recover back money which

at p. 1012

payment thereof, an action accrued (*actio accrevit*). In *assumpsit* the declaration stated the debt, and then averred a promise by the defendant to pay the debt (*indebitatus assumpsit*), and a breach of that promise, such promise being one which would be implied by law from the debt, and not requiring proof as a fact. This alternative form of remedy was very important at a time when different forms of actions could not be joined in the same declaration. . . . These different forms of action however were attended with different consequences, not only in the form of the pleadings, but also in the subsequent proceedings. . . . Thus the form of the judgment and the object of joining various causes of action in the same declaration generally determined the choice of the remedy, and preserved both forms of declaration in constant use. . . . These distinctions are now removed by the operation of the Common Law Procedure Act. . . . There is now therefore but one form of *indebitatus* count, which comprises all the advantages of both the forms under the old procedure; and the action of *indebitatus assumpsit* is virtually become obsolete.' Soon after this was written the simplification effected by the Common Law Procedure Act was carried further by the complete abolition of the forms of action by the Judicature Act.

¹ Obviously Lord Mansfield was not implying that the action is 'equitable' in the technical sense. It is of course an action at Common Law.

ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion or oppression; or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'

Commenting on this passage, Lord Wright has pointed out that:

*Fibrosa
Spółka
Akcyjna v.
Fairbairn,
[1943] A.C.
at p. 62*

'Mansfield does not say that the law imports a promise. The law implies a debt or obligation, which is a different thing. In fact he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations it has needed and received qualifications in practice.'

Probably the commonest of the criticisms to which Lord Wright refers is that Lord Mansfield's doctrine is too vague to be a useful guide to decision. English lawyers distrust phrases like 'natural justice' and *aequum et bonum*, though they find no difficulty in applying the test of 'reasonableness', which means exactly the same thing. But this feeling is probably the reason why, although there are no longer, since the Common Law Procedure Act, 1852, any procedural reasons for retaining the fiction of a contract in a quasi-contractual action, there is none the less abundant authority in the dicta of eminent judges for the view

that the gist of such an action is to-day a contract implied by the law. Thus in a case which has sometimes been regarded as definitely settling the law in this sense, Viscount Haldane used these words:

'So far as proceedings *in personam* are concerned, the Common law of England really recognizes (unlike the Roman Law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.'

Sinclair v. Brougham,
[1914] A C
at p. 415

The three other law lords who were parties to this decision used language to the same effect, and it would be easy to multiply illustrations of similar expressions of judicial opinion.

It is believed, however, that the theory that the basis of a quasi-contractual action is an implied contract has never formed the *ratio decidendi* of any reported case, nor indeed is it easy to see how it could do so; and that there are decisions, some of which will be referred to later, which it is difficult to reconcile with it.¹ There are, moreover, expressions of judicial opinion, also of high authority, which definitely reject it. When the authorities are divided, as they are on this point, it is relevant to point out that the fiction of a contract was introduced purely as a procedural convenience, that it was a temporary expedient the necessity for which has now ceased, and that even during the period of about a hundred and fifty years during which it was in use, it was never compulsory to resort to it, since, as we have seen, the action of Debt, in which the fiction had of course no place, remained in use as an alternative method of enforcing quasi-contracts. It would be a strange result if this accidental and temporary

¹ It is admitted that 'the fiction can only be set up with effect if such a contract would be valid if it really existed' (*per* Viscount Haldane, in *Sinclair v. Brougham*, at p. 415). But if such a contract had existed in cases such as *Re Rhodes* or *Craven-Ellis v. Canons* (*infra*), it would have been a nullity. In these cases we have no alternative but to say that what the law does is not to imply a contract, but to impose an obligation.

state of things should have left its permanent impress on the law by changing the gist of a quasi-contractual action from what it originally was, namely, an *obligation* imposed, into a *contract* implied, by the law.

[1914] A.C.
398

The facts in *Sinclair v. Brougham* were shortly these. A building society, in addition to its ordinary business, had engaged in a business of banking which was outside its legal powers, and had accepted large sums from depositors on contracts of borrowing, which were accordingly *ultra vires* and void. The society was being wound up, and after the outside creditors had been paid the remaining assets were insufficient to pay both the shareholders and the bank depositors in full. Each of these classes claimed priority over the other, and the liquidator had taken out a summons asking how the assets in his hands should be disposed of. One of the grounds upon which the claim of the depositors was rested was that the deposits were recoverable as money had and received by the society to their use which, as we shall see, is a common form of quasi-contractual claim.

PP. 424,
440

The House of Lords held that the claim, so far as it rested on this ground, must fail. 'It would', said Lord Haldane, 'be inconsistent with settled law as to the effect of *ultra vires* transactions.' 'An *ultra vires* borrowing', said Lord Parker, 'by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent.' This reasoning was sufficient to dispose of the depositors' claim to priority. The action for money had and received lies for the recovery of a 'debt', and it was settled law that no 'debt' was owing by the society to the depositors, because the contract which purported to create

one was a nullity. The issue before the House therefore did not turn upon the question whether the basis of the action for money had and received is or is not an implied contract. In its final decision the House held that as the mixed mass of assets in the liquidator's hands represented in part moneys of the shareholders which their agents had wrongfully employed in the banking business, and in part the moneys which the depositors had provided, and as it was impossible to say what amount belonged to each of these classes, both of them were entitled to 'follow' their property into the assets by means of a 'tracing' order, and so to recover it ratably so far as the assets would go, but this result was reached by the application of an equitable principle with which we are not here concerned.

Lord Wright
in *Fibrosa*
Spółka
Akcynna v
Fairbairn,
[1943] A.C.
at p. 64;
and *Legal*
Essays, p. 19

The really serious objection to the view that a notional contract is the basis of modern quasi-contract is that it only pushes the difficulty one stage farther back. For we then have to ask, When will the law imply such a contract? and the only possible answer to that question is to say that it will do so when it is just and reasonable that it should. Thus the notional contract is not a true alternative basis to that which Lord Mansfield put forward; it is a test superimposed on his, in deference to a supposed historical necessity and without any logical justification. Of course there is no rule in our law which requires restitution to be made in *all* cases where one man has been unjustly benefited at another's expense, and there is no reason to suppose that Lord Mansfield intended to lay down any such sweeping principle.¹ But it is significant, as Lord Wright has pointed out, that when judges define the substance, as contrasted with the procedural form, of the claim, they drop the reference to the notional contract, and imply that the gist of the action is the obligation to make restitution. Nor in practice do they find any greater difficulty in

Legal
Essays,
p. 20

¹ In an article on 'The Doctrine of Unjustified Enrichment', in the *Cambridge Law Journal*, 1934, p. 223, Professor H. C. Gutteridge gives many instances of the failure of English law to give a remedy in cases of unjustified enrichment.

deciding when that obligation should be held to exist than in applying the principle of public policy; in either case they are guided by precedents through which the detailed application of the principles has been and still is being progressively worked out.

§ 3. *Rights and Liabilities in Quasi-Contract*

Most of the occasions which give rise to quasi-contracts fall under one or the other of the following heads:

(A) *A* has received money which it is just that he should pay over to *B*. Such money is said to be 'received', or to be 'had and received', by *A* 'to the use of' *B*.

(B) *B* has paid money which it is just that *A* should reimburse to him, or he has rendered services for which it is just that *A* should remunerate him. *B* is said to have 'paid money to the use of *A*', or to be entitled to claim from *A* *quantum meruit*.¹

(A) *Money received to the use of another*

This is the most comprehensive head of quasi-contract, and the circumstances which give rise to it are very various. It is possible, however, to enumerate the main types of

¹ The liability on an account stated is sometimes treated as quasi-contractual, but it is not easy to see why. As the following extract from a speech of Lord Atkin explains, there are two forms of account stated, but the first is no more than evidence of a debt, and the second contains all the elements of a true contract.

'An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But, on the other hand, there is another form of account stated which is a very usual form as between merchants in business, in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described.'

Siqueira v. Noronha, [1934] A.C. at p. 337. See, too, *Camillo Tank S.S. Co. v. Alexandria Engineering Works*, 38 T.L.R. 134

case in which the law will hold that one man has received money to the use of another and ought therefore to pay it over to him.

(i) *Money paid on a consideration which has failed*

A prepayment of money made as consideration for the performance of a contract which in the end becomes abortive and is not performed may be recovered. But the failure of consideration must be total, of a kind which entitles the person paying the money to treat the contract as at an end, and he must have elected to do so; for a partial failure his remedy, if any, will be in damages only. The reason of the failure is immaterial. It may, for instance, have been brought about by the death of the other party to the contract; or by his breach of the contract; or by a supervening event which frustrates its object. In the last case, however, recovery now depends on the provisions of the Law Reform (Frustrated Contracts) Act, 1943.

Knowles v
Bovill, 22
L. T. 70.
Rowland v.
Dyall,
[1923] 2
K. B. 500
Fibrosa
Spółka
Akcyjna v.
Fairbairn,
[1943] A.C.
32
Supra, p. 356

But the action for money had and received is still, as Lord Mansfield said, an 'equitable' action, in the non-technical sense of that word. So in *Berg v. Sadler*, where the plaintiff, after having been placed on a 'stop-list' for selling cigarettes at 'cut' prices, had ordered them from the defendants through another person, and paid for them, he was unable to recover what he had paid, when the defendants on discovering the trick refused either to deliver the goods or return the money. He could demand the repayment, said Lord Wright, M.R., only on the ground 'that it was contrary to what was *aequum et bonum* for the defendants to retain it', but to prove that he would have had to show that he paid the money in an attempt to effect a fraudulent purpose.

[1937] 2
K. B. 158

(ii) *Money paid under mistake of fact*

The foundation of the modern law is the case of *Kelly v. Solari*. An insurance company had paid the policy moneys

9 M. & W.
54

on a policy which had lapsed by reason of the non-payment of premiums by the assured. The Company had known that fact, but it had been overlooked, and it was held that this did not preclude it from recovering. Negligence on the part of the person paying the money in not discovering the true facts will therefore not prevent him from recovering it, if in fact at the time of the payment he does not know them; the fact that means of knowledge were available to him is relevant only in so far as it may throw doubt on the genuineness of his alleged mistaken belief, or suggest that he intended to pay the money in any case, without reference to the truth or falsehood of the fact. In a modern case, also one of a payment by an insurance company, the mistake here being the belief that the peril insured against had occurred when in fact it had not, the Privy Council has pointed out that this matter of intention is crucial; the mistake must be of a kind which prevents the person paying the money from forming that intention which the law regards as essential to an agreement or to the transfer of money or property. It must, it was said, be a 'basic' or 'fundamental' mistake.

Norwich
Union
Society v.
Price, [1934]
A.C. 455

25 L.J. Ex.
324

A test of the kind of mistake which will make a payment recoverable was formulated by Bramwell, B., in *Aiken v. Short*, in a dictum which has often been applied and discussed in later cases. 'It seems to me', he said, 'that the right to recover money paid under a mistake of fact must have reference to the belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money; and it never can be applicable to a case where the fact mistaken is a fact which would merely have made it desirable for the person paying it to pay to the person receiving it.' But there are later decisions which are not consistent with this statement of the rule, and the Court of Appeal has now pointed out that it must not be regarded as final or exhaustive. In *Morgan v. Ashcroft*, a bookmaker claimed to recover, as money had and received, an alleged over-

Kerrison v.
Glyn, Mills,
Currie &
Co., 81
L.J.K.B.
465

[1938] 1
K.B. 49

payment made to the defendant, owing to the mistake of a clerk, in respect of betting transactions. The claim failed on two grounds: first, because of the Gaming Act, 1845; and secondly, because the mistake was not a fundamental or basic one. The position was that the plaintiff had thought that money was owing on bets when in fact it was not; but even if it had been so owing, the law would have prevented him from saying that he intended to make any but a voluntary payment; he had merely made one kind of voluntary payment when he thought he was making another. The facts therefore brought the case within Baron Bramwell's rule; but the Court thought that that rule went too far in implying that a mistake can never ground an action for money had and received unless it induces in the mind of the person paying the belief that his payment will discharge or reduce some liability. They suggested, for instance, the case of a gift made to one person under mistake for another, and were inclined to think that such a payment, although it would be made without any thought of discharging a liability, might be recovered.

In his judgment in *Kelly v. Solari*, Parke, B., said that it would be 'against conscience' for the defendant to retain the money in the circumstances of that case, and this, as we have seen, is the basis on which Lord Mansfield had placed the action for money had and received in *Moses v. Macferlan*.² Burr. 1005 But it has already been pointed out that Lord Mansfield's principle of *aequum et bonum* is not an absolute principle but one that needs qualification, and *Marriott v. Hampton* illustrates one of the qualifications which have been placed upon it. That was a case in which it was certainly *aequum et bonum* that the defendant should have had to return the money; but the facts of the case brought that principle into conflict with another which it is also desirable that the law should uphold, and which the Court held ought in the circumstances to be preferred. The defendant had recovered from the plaintiff in a previous

action the price of goods sold; in fact the plaintiff had already paid for these goods, but, having mislaid the receipt, he had been unable to prove the payment. Having now found the receipt, he tried to recover the second payment, but he failed because, as Lord Kenyon, C. J., said, 'after a recovery by process of law there must be an end of litigation; otherwise there would be no security for any person'. In such cases it is not necessary that the money should have been paid under a judgment; it is enough if it was paid under pressure of legal process, for when a person has had an opportunity of defending an action but has preferred to pay instead of doing so, the law will not allow him to try in a second action what he might have set up in the defence to the original action. But in such a case recovery will only be barred if the party bringing the pressure to bear has acted in good faith.

Moore v.
Fulham
Vestry,
[1895] 1
Q B 399

Ward v.
Wallis,
[1900] 1
Q B. 675

Money paid under a mistake is only recoverable if the mistake is one of fact. It must not be one of law.¹ The justice of this rule may be doubted, but it is well settled.

2 East 469

It was laid down in *Bilbie v. Lumley*, where an underwriter tried to recover money which he had paid on a policy on the ground that a certain letter had been concealed from him; before the payment was made, he had learnt of the existence of this letter, and his only mistake was therefore that he did not know that its previous concealment from him would have given him a good defence against having to pay. Having paid in full knowledge of all the facts, and being mistaken only as to their legal effect, he could not recover. *Sawyer v. Window Brace* provides a modern illustration of the application of this rule.

[1943]
K B 32

(iii) *Restitution of benefit tortiously obtained*

A person against whom a tort has been committed sometimes has a choice of remedies. He may either bring an

¹ Reference may be made to an article by Professor P. H. Winfield on 'Mistake of Law' in L.Q.R. 1943, p. 327.

action in tort for damages, or he may bring one in quasi-contract to recover the value of the benefit obtained by the tortfeasor through his wrongful act. If he chooses the quasi-contractual remedy, he is sometimes said to 'waive the tort', but that is a misleading phrase. 'Waiver' suggests some sort of condonation, and nothing of the sort is involved; 'if I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them, I am not excusing him. I am protesting violently that he is a thief, and because of his theft I am suing him.' The plaintiff will still have to prove that the tort was committed even if he chooses the quasi-contractual remedy; and if in such a case he can be said to 'waive' anything, it is not the tort, but only the right to recover damages for it; for, of course, he cannot have both remedies, but must choose between them. Thus, 'where waiving the tort was possible, it was nothing more than a choice between possible remedies derived from a time when it was not permitted to combine them or to pursue them in the alternative, and when there were procedural advantages in selecting the form of *assumpsit*' [that is to say, in suing in quasi-contract]. It would simplify the law if we could treat this particular case of quasi-contractual liability to-day merely as part of the rules for the assessment of damages in tort, but for historical reasons that is not how the law has regarded it. Most of the procedural advantages to which Lord Simon refers disappeared with the abolition of the forms of action by the Judicature Act, 1873, and of the few remaining ones two have recently been abolished. By the Limitation Act, 1939, the period of limitation for actions in tort is now the same as for quasi-contract, namely six years, whereas previously the periods with respect to some torts were shorter; and since the Law Reform (Miscellaneous Provisions) Act, 1934, the maxim *actio personalis moritur cum persona*, which did not apply to actions in quasi-contract, no longer applies (with a few exceptions) to actions of tort either.

Lord Atkin,
in *United
Australia v
Barclays
Bank*, [1941]
A C at p 29

Viscount
Simon, *ibid*
at p 13

It does not seem possible, on the authorities as they stand, to formulate any general rule for determining in what cases a tort can or can not be 'waived' in this way. The torts which most commonly occur in the cases are trespass, conversion, deceit, and extorting money by threats, and it is tempting to say that whenever a tortfeasor has acquired some definite profit as the proceeds of his wrongful act the law will allow the plaintiff *either* to sue for damages, *or* for restitution of the value of that benefit, at his option. But it is doubtful whether any such simple rule can be said to be established by the cases. Some of the fog, however, which has accumulated round this historical curiosity of the law has now been dispelled by the speeches made in the House of Lords in *United Australia v. Barclays Bank*.¹

[1941] A.C. 1

(iv) *Money paid under an illegal contract*

(v) *Money deposited with a stakeholder*

The right to recover money which has been paid under an illegal contract when the parties are not *in pari delicto*, or when performance in furtherance of the illegal purpose has not yet taken place, and the right to recover money deposited with a stakeholder, are instances of rights falling under this head of quasi-contract. But these matters have been sufficiently treated in an earlier chapter.

Supra, pp
213 & 239

(vi) *The scope of the action for money had and received*

Scott, L. J.,
in *Morgan v.*
Ashcroft,
[1938] 1
K.B. 49

'The final demarcation of the boundaries of the old action of money had and received has not yet been achieved, and their final delineation can only be worked out as concrete cases arise and bring up new points for decision.'

[1939] 1
K.B. 724

Dies v. British Mining Co. is an interesting example of this capacity of the action to provide a remedy for cases not exactly falling within any of the traditional categories, but where it is reasonable to hold that money which has come into the hands of one person ought to be treated as

¹ This case is discussed by Lord Wright in an article in L.Q.R. 1941, p. 185.

money received to the use of another and paid over to him. The plaintiff had paid a sum of £100,000 to the defendants in part prepayment for the purchase of rifles to be delivered under a contract. He later refused either to complete the payments due or to take delivery of the rifles, and the defendants elected to treat this breach of the contract as putting an end to it. But they refused to return the £100,000. *Stable, J.*, held that the plaintiff might recover it, less the amount of any damages suffered by the defendants through the breach of the contract by the plaintiff. It may seem strange at first sight that the plaintiff, who was the party in fault, should have succeeded. But the judge pointed out that to hold otherwise would have resulted in allowing the defendants in effect to keep the money as liquidated damages, whereas it would really have been a penalty; they could recover any damages they had actually suffered and were therefore amply protected; and they ought not to be allowed to retain both the money which had been paid for the goods and the goods themselves, which they had not delivered, as well. *Supra*, p. 369

(B) *Money paid, or services rendered, to another*

'The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.'

Bowen,
L. J., in
Falcke v
Scottish
Imperial
Insurance
Co., 34 Ch D.
at p. 248

Re Cleadon Trust provides a modern illustration of the application of this principle. The director of a company had paid money, at the request of the company's secretary, in discharge of the debt of some subsidiary companies in which the main company was interested. These payments had been treated as advances to the main company, and its directors had purported to confirm them by a resolution, which, however, was found not to have been validly passed because one member of the board, whose vote was

[1939] 1 Ch.
286

necessary for a quorum, was not entitled to vote. The Court of Appeal held that the plaintiff could not recover the payments. They were voluntary payments, made without any legal liability, in discharge of the debts of others. Nor was it possible on the facts to imply any contract by the company to repay them, since for that it would have been necessary to attribute to the company both the knowledge that they were being made, and acquiescence in receiving the benefit conferred by them, and in default of an independent board of directors neither of these requirements could be satisfied.

To this general principle of the law there are, however, exceptions.

(i) *Money paid to the use of another*

*Moule v
Garrett,
L.R. 7 Ex.
at p. 104*

'Where the plaintiff has been compelled by law to pay, or being compellable by law to pay, has paid, money which the defendant was ultimately bound to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.'

This rule was originally formulated in these terms in Leake's Law of Contract, and it has often been judicially approved. The circumstances which create the liability therefore are: that *A* and *B* are both liable for the same debt; that, as between *A* and *B*, *B* is primarily liable; that *A* pays the debt under compulsion of law; and that *B* is thereby discharged from his liability. In these circumstances *B* becomes bound to indemnify *A*.

A few illustrations may be given of the kind of circumstances in which the principle applies. One man leaves his goods in the course of business on the premises of another and has to pay the rent due from that other in order to prevent a distress upon his goods; or to pay customs duties due to the revenue; a surety pays the debt of his principal debtor, or one of several co-sureties pays more than his due share of a debt for which they are all liable; or a partner pays the separate debt of another partner to

*Edmunds v
Wallingford,
14 Q.B.D.
811*

*Exall v.
Partridge,
8 T.R. 308*

*Brooks
Wharf v.
Goodman,
[1937] 1
K.B. 534*

*Kemp v.
Finden, 12
M. & W.
421*

prevent the seizure of the joint property of the firm. In all these cases there will exist a right to an indemnity or to a contribution, as the case may be, even though there has been no agreement to indemnify or to contribute. If there has been such an agreement, the liability will be contractual; if not, it will be quasi-contractual, imposed by the law. Since the Law Reform (Married Women and Tortfeasors) Act, 1935, too, if one of several tortfeasors is compelled to pay the damages for which all are liable, he may claim a contribution from the others, but the Act contains special provisions defining the extent of the right in this case.¹

(ii) *Services rendered to another*

Munro v. Butt illustrates the general rule that work and labour performed by one man for the benefit of another does not, without more, impose any liability on that other to pay for the benefit he has received. *A* had contracted to do certain specified work on *B*'s house for a specified sum by a specified day; he failed to complete it, and *B* resumed possession of the house. It was held that *A* could not recover on the contract, because he had not fulfilled it; and that *B*'s resumption of possession afforded no evidence either of an agreement to dispense with the conditions of the original contract and to substitute a new one for it, or of an agreement to pay for such work as *A* had actually done. The case was followed in *Sumpter v. Hedges*, where the facts were almost the same.

8 E. & B.
758

[1898] 1
Q.B. 673

But there are exceptional circumstances in which the law does allow one who has rendered some service to another to claim to be paid for it, even without any agreement to that effect. They are cases in which the law, under the old forms of pleading, allowed actions to be brought on a *quantum meruit* basis, i.e. for so much as

¹ Reference may be made on this subject to an article, 'Quasi-Contract arising from compulsion', by Professor P. H. Winfield, in *L.Q.R.* 1944, vol. 60, p. 341.

the work done was worth, and we have noted some of these cases in earlier chapters.

Supra, p. 374

We have seen, for instance, that when a contract has been broken in such a way as to entitle the injured party to treat it as at an end and he has elected to do so, he may bring an action for *quantum meruit*, for the value of the work that he has done under the contract, as an alternative to bringing an action *on the contract* for damages.

Re Rhodes,
44 Ch D at
p. 108

We have also, in speaking of infants, and of lunatic and drunken persons, had illustrations of the rule that when necessities have been supplied to a person who by reason

Supra, pp.
132 & 140

of disability is unable to contract to pay for them, the law will imply an obligation on such person to pay their reasonable value. The obligation which the law imposes on the principal in cases of agency of necessity is similar in character.

Supra, p. 389

[1903] 1
K.B. 772
Supra, p. 64

Still another class of case is that which we saw exemplified in *Lawford v. Billericay R.D.C.*, where services had been rendered, and the benefit of them taken, under a contract which was a nullity in law. A later case of this type, in which the Court of Appeal has explained the principle on which the recovery of remuneration is allowed, is *Craven-Ellis v. Canons*.¹ There the plaintiff had acted as the managing director of a company under an agreement which turned out to be void because the directors who had purported to make it had not been properly qualified to act for the company. The plaintiff therefore, like the engineer in *Lawford v. Billericay R.D.C.*, could not recover the remuneration to which the contract would have entitled him. Nor could it be said that his services had been rendered in circumstances which showed that the company had impliedly undertaken to pay for them; if there had been no void contract in the case, that would have been the natural inference to draw from the rendering of the services and their acceptance by the company, but any inference

[1936] 2
K.B. 403

¹ This case is discussed by Mr. A. T. (now Mr. Justice) Denning in L.Q.R. 1939, p. 54.

of such a genuine implied contract was ruled out by the fact that obviously both sides supposed themselves to be acting under the express contract which they thought they had made. If there was any liability to pay a remuneration therefore, it could only be one imposed by the law in the circumstances of the case, that is to say, a quasi-contractual liability, and this was what the Court decided. They held that when work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact, the contract can be disregarded, and the law will impose an obligation to pay on a *quantum meruit* basis.¹ Incidentally we may note the extreme artificiality that would be involved in basing the liability which the Court found to exist in this case on a contract implied by law.

Finally we may note that the liability of the owner of a ship or cargo to compensate a salvor, that is to say, one who, acting not under a contract but voluntarily, saves a ship or its cargo or the lives of persons on board, has all the marks of a quasi-contractual liability. But salvage belongs to the law of Admiralty and not to the Common Law, and cannot be discussed here.

¹ The instances of *quantum meruit* actions in the text are quasi-contractual. But to avoid misunderstanding it may be well to point out that these are exceptional cases, for most *quantum meruit* actions are genuinely contractual. Such actions, though they are not always so described in modern times, are exceedingly common, for whenever one person has rendered a service to another in circumstances which indicate an understanding between them that it is to be paid for, although no particular remuneration has been specified, the law will infer a promise to pay *quantum meruit*, i.e. as much as the party doing the service has deserved, or, as we generally say, a 'reasonable' sum. The principle is precisely the same when goods are bought and sold without an express agreement as to the price, in which case the Sale of Goods Act says that the buyer must pay a 'reasonable price'; under the old forms of pleading he had to pay *quantum valebant*, so much as the goods were worth.

Another common case of contractual *quantum meruit* occurs when the conduct of the parties to an express contract leads to the inference that they have agreed to substitute for it a new contract. The cases of *Steven v. Bromley* and *Hart v. Mills*, which have been cited in earlier chapters, illustrate this situation.

[1919] 2
K.B. 722
Supra, p. 26
15 M. & W.
87
Supra, p. 10

APPENDIX A

FORM OF CHARTER-PARTY¹**Charter-Party,**

19

IT IS THIS DAY MUTUALLY AGREED, between
 of the good Ship or Vessel called the
 of the measurement of
 Tons Register, or thereabouts, and

Merchant,

that the said ship being tight, staunch, and strong, and in every way fitted for the Voyage, shall with all convenient speed, sail and proceed to

or as near thereunto as she may safely get, and there load from the factors of the said Merchant a full and complete cargo

which is to be brought to and taken from alongside at Merchant's Risk and Expense, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to

or as near thereunto as she may safely get, and deliver the same on being paid freight.

Restraint of Princes and Rulers, the Act of God, the King's Enemies, Fire, and all and every other Dangers and Accidents of the Seas, Rivers, and Navigation of whatever Nature and Kind soever, during the said Voyage, always excepted.

Freight to be paid on the right delivery of the cargo.

days to be allowed the said Merchant (if the Ship be not sooner despatched), for

and days on Demurrage² over and above the said laying days at £ per day.

Penalty for non-performance of this agreement, estimated amount of freight.³

Witness to the signature of }

Witness to the signature of }

¹ The above is a 'voyage' charter-party, i.e. made for a specified voyage. Another form of charter-party is the 'time' charter-party, for a definite period.

² It is usual to fix a certain number of days, called 'lay days', for the loading and unloading of the ship. Beyond these the merchant may be allowed to detain the ship, if need be, on payment of a fixed sum *per diem*, such additional days being in fact lay days that have to be paid for: *Wilson v. Thoresen*, [1910] 2 K.B. 405. Both the detention and the payment are called *Demurrage*. 'Demurrage' is really agreed or liquidated damages for each day's detention. If no rate of demurrage is agreed, the shipowner has a claim for unliquidated damages (called 'damages for detention'), i.e. what he can prove he has in fact lost by the delay: *Inverskip SS. Co. v. Bunge*, [1917] 2 K.B. 193.

³ The inveterate conservatism of merchants appears to be the only reason for the retention of this clause in charter-parties; for the 'penalty' is of course unenforceable as such (*supra*, p. 369), only the actual damage suffered being recoverable.

APPENDIX B

FORM OF BILL OF LADING FOR GOODS SHIPPED
ON SAILING VESSEL¹

Shipped in good Order and well conditioned by
in and upon the good Ship called the
whereof is Master for this present Voyage
and now riding at Anchor in the _____ and bound for

to say

being marked and numbered as in the Margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port of

(the Act of God, the King's Enemies, Fire, and all and every other Dangers, and Accidents of the Seas, Rivers, and Navigation of whatever nature and kind soever excepted) unto

or to Assigns he or they paying Freight for the said Goods
with Primage and Average accustomed.³ **In Witness** whereof the
Master or Purser of the said Ship hath affirmed to Bills of Lading
all of this Tenor and Date the one of which Bills
being accomplished the other to stand void.
Dated in

¹ It would be difficult at the present day to find in actual use either a charter-party or a bill of lading in so simple a form as these given here. Those now used are very much more complicated, and in particular the list of 'excepted perils' is very greatly increased.

² *Primage* was a small customary payment to the master, and *Average* (sometimes called 'petty average') here means small necessary payments made by the master and repaid him by the merchant. Both are practically obsolete, though the clause is still sometimes printed as in the above form.

Particular average means the incidence of loss from damage to any part of ship or cargo upon the individual owner or his insurer, and is equivalent to partial, as opposed to total, loss.

General average means the apportionment of the loss among all the parties interested in ship or cargo in proportion to their interest where the loss is caused intentionally and for the common safety, as by cutting away masts or throwing cargo overboard.

APPENDIX C

LLOYD'S POLICY OF MARINE INSURANCE

[Now scheduled to *Marine Insurance Act, 1906*]S. G.¹**Be it known that**

— as well in own Name, as for and in the Name and Names of all and
 £ every other Person or Persons to whom the same doth, may, or shall appertain
 — in part or in all, doth make assurance, and cause and them and
 every of them, to be insured, lost or not lost, at and from
 upon any kind of Goods and Merchandises, and also upon the Body, Tackle,
 Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in
 the good Ship or Vessel called the
 whereof is Master, under God, for this present voyage,
 or whosoever else shall go for Master in the said Ship, or by whatsoever other
 Name or Names the said Ship, or the Master thereof is or shall be named or
 called, beginning the Adventure upon the said Goods and Merchandises from
 the loading thereof aboard the said Ship
 upon the said Ship, &c.
 and shall so continue and endure, during her Abode there, upon the said Ship,
 &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel,
 &c., and Goods and Merchandises whatsoever, shall be arrived at
 upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in
 good Safety, and upon the Goods and Merchandises, until the same be there dis-
 charged and safely landed; and it shall be lawful for the said Ship, &c., in this
 Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever
 without Prejudice to this Insurance. The said Ship, &c., Goods and Mer-
 chandises, &c., for so much as concerns the Assured, by Agreement between
 the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to
 bear and to take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire,
 Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart,
 Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings,
 Princes, and People, of what Nation, Condition, or Quality soever, Barratry of
 the Master and Mariners, and of all other Perils, Losses, Misfortunes that have
 or shall come to the Hurt, Detriment, or Damage of the said Goods and Mer-
 chandises and Ship, &c., or any Part thereof; and in case of any loss or Misfortune,
 it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue,
 labour and travel for, in, and about the Defence, Safeguard and Recovery of
 the said Goods and Merchandises, and Ship, &c., or any Part thereof, without
 Prejudice to this Insurance; to the Charges whereof we, the Assurers, will con-
 tribute, each one according to the Rate and Quantity of his Sum herein assured.
 And it is especially declared and agreed that no acts of the insurer or insured in
 recovering, saving, or preserving the property insured shall be considered as a
 waiver, or acceptance of abandonment. And it is agreed by us the Insurers, that
 this Writing or Policy of Assurance shall be of as much Force and Effect as the surest
 Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal
 Exchange, or elsewhere in London. And so we the Assurers are contented, and do
 hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors,
 and Goods, to the Assured, their Executors, Administrators, and Assigns, for the
 true Performance of the Premises, confessing ourselves paid the Consideration due
 unto us for this Assurance by the assured at and after the rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums
 assured in

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average,
 unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and
 Skins are warranted free from Average under Five Pounds per Cent.; and all
 other Goods, also the Ship and Freight, are warranted free from Average under
 Three Pounds per Cent.; unless general, or the Ship be stranded.

¹ These letters always appear on a Lloyd's policy, but their original significance
 is uncertain. 'Ship and Goods', 'Salutis Gratia' have been suggested.

APPENDIX D FORM OF INLAND BILL OF EXCHANGE

£100.	Three months after date sum of one hundred pounds	pay for	to Mr. JOHN STYLES or order the value Richard received.
To RICHARD ROE, Esq.		JOHN DOE.	

Accepted payable at the
Old Bank, Oxford,
Richard Roe.

OXFORD, 1st January, 1945

INDORSEMENT IN BLANK OF ABOVE BILL

<i>John Styles</i>	
--------------------	--

(1) SPECIAL INDORSEMENT AND (2) INDORSEMENT IN BLANK BY INDORSEE¹

<i>Pay William Smith or order John Styles William Smith</i>	
---	--

FORM OF PROMISSORY NOTE

£100. I promise to pay RICHARD ROE or order at the Old Bank, Oxford, six months after date the sum of one hundred pounds, for value received.	OXFORD, 1st January, 1945 JOHN DOE.
---	--

NOTE.—These instruments require an *ad valorem* stamp.

¹ In this form Styles has 'specially' indorsed the bill to Smith, thus making it negotiable only by Smith's indorsement. Smith has subsequently indorsed it in blank, thus making it payable 'to bearer'.

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